Shencourt Sdn Bhd v Aseambankers Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–665 OF 2005
ZAINUN ALI J
28 JULY 2011

Contract — Breach — Damages — Loan syndication facility granted by defendant and co-lenders to plaintiff for completion of construction project — Defendant assumed lead bank role in loan facility — Whether defendant bank in breach of its contractual duties as agent in loan facility — Whether defendant's indifference towards plight of plaintiff inconsistent with its duties as plaintiff's agent — Whether defendant in breach of duty to act in good faith in conduct of facilities granted to plaintiff — Whether defendant was fiduciary of plaintiff — Whether defendant and co-lenders misapplied monies — Whether delay by defendant and co-lenders in response to their obligations as bankers was direct cause of delay in completion of revised project — Whether defendant and co-lenders jointly liable for damages claimed by plaintiff — Whether defendant and co-lenders in breach of contractual, tortious and fiduciary obligations under financial arrangement

Shencourt Sdn Bhd ('the plaintiff'), a developer, acquired a piece of land in Ampang ('the land') and initiated a development and construction project ('the project'), which consisted of a shopping podium (Phase 1) and one office block and one block hotel suite (Phase 2) on the land. Around early 1996, the plaintiff approached Aseambankers Malaysia Bhd (the defendant) to arrange a refinancing of its loans for purposes of completing the project. In view of the large amount of monies involved the first defendant arranged for syndicated lending. This loan syndication facility ('the loan facility') to the plaintiff for the sum of RM62m was co-ordinated by the first defendant with the participation of other banks ('the co-lenders'). The defendant assumed the lead bank role of the loan facility, which was made up of a revolving credit facility of RM4m and a bridging loan of RM58m, that was formalised by the execution of a facility agreement dated 27 June 1996 ('the FA'). Pursuant to the terms of the FA, the defendant as agent was paid agency fees to manage and monitor the facilities for and on behalf of the plaintiff. The loan facility was to be disbursed to the plaintiff in three tranches and a list of facilities was secured by the defendant and the co-lenders for these facilities. When the plaintiff had completed about 80% of Phase 1 of the project, it on its own volition cancelled the third tranch disbursement and approached the defendant to restructure the loan facility so as to enable it to complete Phase 1 of the project and to provide additional facility to complete the new Phase 2. After much exertion on the part of the plaintiff and in view of a Bank Negara directive the defendant and the co-lenders agreed to provide the additional facilities to the plaintiff, but the

plaintiff was required to place RM2m in fixed deposits, which it did. This restructuring of the loan facility ('the restructuring') for an additional RM17m was embodied in a supplementary agreement dated 17 December 1999 ('the first SA'). On or about July 2000, when the plaintiff requested the defendant to drawdown RM359,096.33, the defendant refused to allow the drawdown on the grounds that the condition precedent for the release of the loan had not been met by the plaintiff. The defendant and the co-lenders alleged that the breach occurred when the plaintiff failed to service the monthly interest payments due to them under the first SA and also failed to maintain six months' worth of interest in the Debt Service Account ('DSRA') at all times. The plaintiff contended that this and other subsequent acts of the defendant and the co-lenders had caused the work on the project to cease causing it to suffer irreparable loss and damage. The plaintiff thus claimed against the defendant for allegedly breaching its duty to act in good faith in the conduct of facilities granted by the defendant to the plaintiff ('the plaintiff's suit'). The alleged breaches included, inter alia, the defendant's refusal to allow drawdown of RM359,096.33 in 2000 to the plaintiff and failure to uplift the fixed deposit funds of RM2m to make good the alleged arrears of interest owed by the plaintiff; failure to allow drawdown of the facility even though the plaintiff had complied with the defendant's request to appoint a consultant to prepare a feasibility report and which report had recommended the completion of the project; failure to promptly issue a redemption statement at RM38,500,000 even after the plaintiff had secured fresh financing from a white knight; failure to approve and disburse the advance payments for statutory compliance to the plaintiff even though the defendant was aware that the statutory payments were required to obtain the certificate for fitness for Phase 1; failure to assist the plaintiff to commence the operations of the Phase 1 even though the defendant was fully aware that the proceeds of rental of Phase 1 was required by the plaintiff to repay the loan facility granted by the defendant and co-lenders; failure to grant the plaintiff an extension of the moratorium period. In all these it was the plaintiff's case that it had borrowed money in good faith from a syndicate of banks managed by the defendant, where the plaintiff relied on the reasonable belief that the defendant would manage the loan in good faith with the highest possible standards of the banking industry but the tardiness of the defendant had directly caused delay in the completion of the project and denied the plaintiff the opportunity to limit its exposure for LAD for late delivery of the individual properties for the revised project of RM10m. The plaintiffs thus sought damages against the defendant for breaches of contractual, tortious and professional duties, which the plaintiff contended the defendant and co-lenders owed to it. It was the defendant's case that it was a supreme act of bad faith on the plaintiff's part to institute an action against the defendant and co-lenders after all they had done to accommodate the plaintiff so that it could complete its project. The defendant and co-lenders then filed a suit against the plaintiff and its guarantor for repayment of the amounts drawn

by the plaintiff under the facilities granted to it ('the defendants' suit'). The plaintiff's suit and the defendants' suit were consolidated and heard together.

Held, allowing the plaintiff's claim:

(1) On a plain reading of the first SA it was clear that the plaintiff had not instructed the defendant or the co-lenders to utilise the monies received from the end purchasers/financiers towards repayment of the principal until all interest and default interest had been paid. Further the FA of 27 June 1996 clearly allowed the defendant and co-lenders to immediately utilise such sums received from the end purchasers/financiers towards repayment of the principal loan sum. However, it was found that the defendant had misapplied the monies received from the end purchasers/financiers in this transaction and that because of such misapplication the plaintiff was in default of the payment of interest in July 2000 and refused the drawdown of RM359,096.33 in 2000. It was also found that the purported arrears in interest could have been easily settled by taking from the DSRA account held by the defendant and by uplifting the plaintiff's fixed deposit of RM2m. It was also found that alleged non-compliance of the DSRA could easily have been resolved by allowing the plaintiff the drawdown of the facilities. This was because the revenue generated from the project would have been sufficient for the requisites of the DSRA to be complied with (see paras 46–49).

(2) The present case was a situation of a condition precedent to the obligation to lend. The plaintiff had already given the notice of borrowing and the defendant and co-lenders had allowed the first drawdown of 7,734,420.64. However the defendant and co-lenders refused the next drawdown and withdrew from their commitment to lend. It was settled law that any withdrawal by the lender from its commitment to lend even before the plaintiff had begun to satisfy the condition would result in the lender breaching the contract. It was evident from the facts that the defendant's unwarranted and unreasonable failure and/or refusal to allow the plaintiff to drawdown the loan facility had caused the plaintiff to seek alternative methods of financing to complete the construction of the project. In the present case the defendant and the co-lenders could not withdraw from the agreement and by doing so they had breached the contract (see paras 251–254).

(3) It was also evident from the facts that the delay by the defendant and co-lenders in response to their obligations was their motif in their approach to this contract. Although the plaintiff obtained a white knight willing to provide and take over financing of the revised project and the plaintiff had procured letters of waiver from over 70% of the purchasers of Phase 1 to limit their claims for LAD for late delivery of the individual properties to a fixed total sum of RM10m, the defendant and co-lenders

took an inordinate amount of time in issuing the redemption statement. It was found that the defendant's delay in issuing a redemption statement for the loan facility and then finally granting it with onerous conditions imposed on it had directly caused delay in the completion of the project and denied the plaintiff the opportunity to limit its exposure for LAD for late delivery of the individual properties for the revised project to RM10m (see paras 263).

(4) The defendant as a fiduciary was under a duty not to make a profit or to take a benefit by virtue of its position as a fiduciary without the consent of the plaintiff and the relevant authorities. However from the evidence it was clear that the defendant had ulterior motives in not providing financing to the plaintiff. The defendant had unreasonably refused to allow the plaintiff to drawdown the loan facility and the defendant and co-lenders had acted maliciously in depriving the plaintiff of the said facility, which in turn escalated the plaintiff's loss and damages suffered for the non-completion of the same (see paras 273 & 279).

(5) The plaintiff had placed trust and confidence in the defendant and co-lenders and the latter had assumed responsibility for providing the borrower with investment and financial advice. However, the defendant and the co-lenders had not held up their end of the bargain and thus breached their duties owed to the plaintiff in contract, and tort as a banker. It was the defendant and the co-lenders deliberate and malicious mismanagement of the facilities that had caused the plaintiff's dire financial position. Further, the unlawful acts by the defendant and the co-lenders was a breach of the plaintiff's legitimate contractual expectation that the facilities would be administered and managed by the defendant and the co-lenders in a proper and bona fide manner (see paras 305–308).

(6) The defendant and the co-lenders unlawful denial of funds to the plaintiff had a domino effect of causing an inevitable chain reaction which affected the viability of the project, including the plaintiff's ability to repay the facilities. In view of the breach of their contractual, tortious and fiduciary obligations under a financial arrangement, the defendant and the co-lenders were obliged to pay damages to the plaintiff. As a result of the defendant's and the co-lenders' breaches in contract, tort and as a banker to the plaintiff, they were disentitled to recover any part of the loans which were granted by them to the plaintiff (see paras 314–318).

[Bahasa Malaysia summary

Shencourt Sdn Bhd ('plaintif'), pemaju, telah memperoleh sebidang tanah di Ampang ('tanah') dan memulakan projek pembangunan dan pembinaan ('projek'), yang mengandungi podium membeli-belah (Fasa 1) dan satu blok pejabat dan satu blok hotel suite (Fasa 2) atas tanah tersebut. Pada awal tahun

1996, plaintif telah pergi ke Aseambankers Malaysia Bhd (defendan) untuk menguruskan pembiayaan semula pinjamannya bagi tujuan menyiapkan projek tersebut. Oleh kerana ia melibatkan jumlah wang yang besar defendan pertama telah menguruskan pinjaman bersindiket. Kemudahan sindiket pinjaman ini ('kemudahan pinjaman') kepada plaintif untuk jumlah RM62 juta telah diselaraskan oleh defendan pertama dengan penglibatan bank-bank lain ('pemberi pinjaman bersama'). Defendan telah mengambil peranan sebagai bank utama memberi kemudahan pinjaman, yang terdiri daripada kemudahan kredit pusingan sejumlah RM4 juta dan pinjaman penyambung sejumlah RM58 juta, yang telah disempurnakan dengan pelaksanaan perjanjian kemudahan bertarikh 27 Jun 1996 ('PK'). Menurut terma-terma PK, defendan sebagai ajen telah dibayar fi agensi untuk mengurus dan mengawasi kemudahan-kemudahan tersebut untuk dan bagi pihak plaintif. Kemudahan pinjaman tersebut perlu diagihkan kepada plaintif dalam tiga bahagian dan senarai kemudahan telah diperoleh oleh defendan dan pemberi pinjaman bersama untuk kemudahan-kemudahan tersebut. Apabila plaintif telah siap lebih kurang 80% daripada Fasa 1 projek tersebut, ia dengan kerelaan sendiri telah membatalkan bayaran pembayaran bahagian ketiga dan berdepan dengan defendan untuk menstruktur semula kemudahan pinjaman agar membolehkannya siap Fasa 1 projek tersebut dan untuk memberikan kemudahan tambahan untuk menyiapkan Fasa 2 baru. Selepas banyak desakan di pihak plaintif dan berdasarkan arahan Bank Negara defendan dan pemberi pinjaman bersama telah bersetuju untuk memberikan kemudahan tambahan kepada plaintif, tetapi plaintif dikehendaki meletakkan deposit tetapi sejumlah RM2 juta, yang mana telah dilakukannya. Penstrukturan semula kemudahan pinjaman ini ('penstrukturan semula') untuk tambahan RM17 juta termaktub dalam perjanjian tambahan bertarikh 17 Disember 1999 ('PK pertama'). Pada atau sekitar bulan Julai 2000, apabila plaintif memohon defendan mengeluarkan RM359,096.33, defendan telah enggan membenarkan pengeluaran tersebut atas alasan bahawa prasyarat untuk pelepasan pinjaman tersebut tidak dipatuhi oleh plaintif. Defendan dan pemberi pinjaman bersama mendakwa bahawa pelanggaran telah berlaku apabila plaintif gagal membayar ansuran bayaran faedah yang perlu dibayar oleh mereka di bawah PK pertama dan juga telah gagal mengekalkan faedah sejumlah enam bulan dalam Akaun Bayaran Hutang ('ABH') pada setiap masa. Plaintif menegaskan bahawa tindakan ini dan tindakan lain berikut oleh defendan dan pemberi pinjaman bersama telah menyebabkan kerja ke atas projek tersebut dihentikan kerana ia mengalami kerugian dan kerosakan yang tidak dapat dibaiki. Plaintif dengan itu mendakwa terhadap defendan telah dikatakan melanggar kewajipan untuk bertindak dengan niat baik dalam perlakuan memberikan kemudahan yang diberikan oleh defendan kepada plaintif ('guaman plaintif'). Pelanggaran yang dikatakan itu termasuklah, antara lain, keengganan defendan membenarkan pengeluaran RM356,096.33 pada tahun 2000 kepada plaintif dan kegagalan untuk menambah wang deposit tetap sejumlah RM2 juta untuk membayar hutang faedah yang dikatakan tertunggak oleh plaintif, kegagalan untuk

membenarkan pengeluaran kemudahan itu meskipun plaintif telah mematuhi permintaan defendan untuk melantik perunding untuk menyediakan laporan yang mana laporan itu telah menyarankan projek tersebut disiapkan, kegagalan untuk dengan segera mengeluarkan penyata penebusan sejumlah RM38,500,000 selepas plaintif telah menperoleh pembiayaan baru, kegagalan meluluskan dan mengeluarkan bayaran pendahuluan untuk pematuhan statutori kepada plaintif meskipun defendan sedar bahawa bayaran statutori perlu untuk mendapatkan sijil penghunian untuk Fasa 1, kegagalan membantu plaintif memulakan operasi Fasa 1 meskipun defendan sedar bahawa hasil sewaan Fasa 1 diperlukan oleh plaintif untuk membayar balik kemudahan pinjaman yang diberikan oleh defendan dan pemberi pinjaman bersama, kegagalan memberikan plaintif lanjutan tempoh moratorium. Dalam semua yang berikut adalah kes plaintif bahawa ia telah meminjam wang dengan niat baik daripada sindiket bank yang diuruskan oleh defendan, di mana plaintif bergantung kepada kepercayaan munasabah bahawa defendan akan menguruskan pinjaman tersebut dengan niat baik mengikut piawai tertinggi mungkin industri perbankan tetapi kelambatan defendan secara langsung telah melambatkan projek tersebut lambat siap dan menafikan plaintif peluang untuk menghadkan peluangnya untuk LAD kerana serahan lewat hartanah individu bagi projek yang disemak pada RM10 juta. Oleh itu plaintif memohon ganti rugi terhadap defendan kerana pelanggaran kewajipan kontraktual, tort dan profesional oleh defendan dan pemberi pinjaman bersama terhadap plaintif seperimana yang dihujahnya. Adalah kes defendan bahawa ia adalah tindakan berniat jahat di pihak plaintif untuk memulakan tindakan terhadap defendan dan pemberi pinjaman bersama setelah semua yang dilakukan oleh mereka untuk membantu plaintif agar ia dapat menyiapkan projeknya. Defendan dan pemberi pinjaman bersama kemudian telah memfailkan guaman terhadap plaintif dan penjaminnya untuk bayaran balik jumlah yang dikeluarkan oleh plaintif di bawah kemudahan yang diberikan kepadanya ('guaman defendan'). Guaman plaintif dan guaman defendan telah digabungkan dan didengar bersama.

Diputuskan, membenarkan tuntutan plaintif:

(1) Bacaan biasa PK pertama adalah jelas bahawa plaintif tidak mengarahkan defendan atau pemberi pinjaman bersama untuk menggunakan wang yang diterima daripada pembeli akhir/pembiaya untuk bayaran balik jumlah pinjaman prinsipal. Walau bagaimanapun, adalah didapati bahawa defendan telah salah menggunakan wang yang diterima daripada pembeli akhir/pembiaya dalam transaksi ini dan oleh kerana penggunaan salah ini plaintif telah gagal membayar faedah untuk bulan Julai 2000 dan enggan mengeluarkan RM359,096.33 pada tahun 2000. Adalah juga didadapti bahawa hutang faedah yang dikatakan itu boleh diselesaikan dengan mengambil daripada akaun ABH yang dipegang oleh defendan dan dengan meningkatkan deposit tetap plaintif sebanyak

RM2 juta. Adalah juga didapati bahawa ketidakpatuhan ABH yang dikatakan itu boleh diselesaikan dengan membenarkan plaintif mengeluarkan kemudahan. Ini kerana hasil yang diperoleh daripada projek tersebut adalah mencukupi untuk keperluan ABH dipatuhi (lihat perenggan 46–49).

(2) Kes ini dalam situasi prasyarat dengan obligasi untuk meminjam. Plaintif telahpun memberikan notis peminjaman dan defendan dan pemberi pinjaman bersama telah membenarkan pengeluaran pertama sejumlah RM7,734,420.64. Walau bagaimanapun defendan dan pemberi pinjaman bersama enggan membuat pengeluaran seterusnya dan menarik diri daripada komitmen untuk memberi pinjaman. Adalah undang-undang tetap bahawa apa-apa penarikan diri oleh pemberi pinjaman daripada komitmennya untuk memberi pinjaman sebelum plaintif memenuhi syarat lagi akan menyebabkan pemberi pinjaman itu melanggar kontrak. Adalah nyata berdasarkan fakta bahawa kegagalan defendan yang tidak wajar dan munasabah dan/atau keengganan untuk membenarkan plaintif mengeluarkan kamudahan pinjaman telah menyebabkan plaintif merujuk kepada cara alternatif untuk pembiayaan bagi menyiapkan pembinaan projek tersebut. Dalam kes ini defendan dan pemberi pinjaman bersama tidak boleh menarik diri daripada perjanjian dan dengan berbuat demikian mereka telah melanggar kontrak (lihat perenggan 251–254).

(3) Adalah juga nyata berdasarkan fakta bahawa kelewatan oleh defendan dan pemberi pinjaman bersama melaksanakan obligasi mereka merupakan 'motif' dalam pendekatan mereka terhadap kontrak ini. Meskipun plaintif telah mendapat penyelamat yang sanggup memberi dan mengambil alih pembiayaan projek yang disemak itu dan plaintif telah mendapat surat penepian lebih 70% daripada pembeli Fasa 1 untuk menghadkan tuntutan mereka untuk LAD bagi serahan lewat hartanah individu untuk jumlah tetap keseluruhan berjumlah RM10 juta, defendan dan pemberi pinjaman bersama telah mengambil masa yang lama untuk mengeluarkan penyata penebusan. Adalah didapati bahawa kelewatan defendan mengeluarkan penyata penebusan untuk kemudahan pinjaman dan kemudian akhirnya memberikannya dengan pelbagai syarat telah secara langsung menyebabkan kelewatan dalam menyiapkan projek dan menafikan plaintif peluang untuk menghadkan pemberian LAD untuk serahan lewat hartanah individu untuk projek yang disemak kepada RM10 juta (lihat perenggan 263).

(4) Defendan sebagai fidusiari di bawah kewajipan membuat keuntungan atau mendapat manfaat berdasarkan kedudukannya sebagai fidusiari tanpa persetujuan plaintif dan pihak berkuasa yang relevan. Walau bagaimanapun berdasarkan keterangan ia jelas bahawa defendan mempunyai motif lain untuk tidak memberikan kemudahan kepada

plaintif. Defendan secara tidak munasabah enggan membenarkan plaintif mengeluarkan kemudahan pinjaman dan defendan dan pemberi pinjaman bersama telah bertindak dengan niat jahat menafikan plaintif kemudahan tersebut, yang menyebabkan plaintif mengalami kehilangan dan kerugian akibat ketidakpatuhannya (lihat perenggan 273 & 279).

(5) Plaintif telah meletakkan kepercayaan dan keyakinan pada defendan dan pemberi pinjaman bersama dan mereka telah mengambil tanggungjawab itu untuk memberikan peminjam nasihat pelaburan dan kewangan. Walau bagaimanapun, defendan dan pemberi pinjaman bersama tidak melaksanakan tanggungjawab mereka dan oleh itu telah melanggar kewajipan mereka kepada plaintif dalam kontrak, dan tort sebagai pegawai bank. Pengurusan salah kemudahan defendan dan pemberi pinjaman bersama yang disengajakan itu telah menyebabkan kedudukan kewangan plaintif tergugat. Tambahan, tindakan menyalahi undang-undang oleh defendan dan pemberi pinjaman bersama merupakan pelanggaran jangkaan kontraktual sah plaintif bahawa kemudahan itu akan ditadbir dan diuruskan oleh defendan dan pemberi pinjaman bersama dengan betul dan niat baik (lihat perenggan 305–308).

(6) Penafian defendan dan pemberi pinjaman bersama yang menyalahi undang-undang tentang wang itu kepada plaintif mempunyai kesan domino yang menyebabkan reaksi berantai yang tidak dapat dielakkan sehingga menjejaskan daya maju projek tersebut, termasuklah kemampuan plaintif untuk membayar balik kemudahan tersebut. Berdasarkan pelanggaran kewajipan kontraktual, tort dan fidusiari mereka di bawah perjanjian kewangan, defendan dan pemberi pinjaman bersama bertanggungjawab membayar ganti rugi kepada plaintif. Akibat daripada pelanggaran kontrak, tort dan sebagai pegawai bank kepada plaintif oleh defendan dan pemberi pinjaman bersama, mereka tidak berhak mendapat balik mana-mana bahagian pinjaman yang telah diberikan oleh mereka kepada plaintif (lihat perenggan 314–318).]

Notes

For cases on damages see, 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3022–3059.

Cases referred to

Abdul Rahim Abdul Hamid v Perdana Merchant Bankers Bhd [2006] 5 MLJ 1, FC (refd)

Anjala Ammal and Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Bank Utama (M) Sdn Bhd v Insan Budi Sdn Bhd [2009] 1 MLJ 148, CA (refd)

Bench Win Sdn Bhd v Eon Bank Bhd [2003] MLJU 472, HC (refd)

Bentworth Finance Ltd v Lubert [1968] 1 QB 680, CA (refd)

Boardman v Phipps [1967] 2 AC 46, HL (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Bunge Corp v Tradax SA [1981] 2 All ER 513, H((refd)
Esso Petroleum Co Ltd v Mardon [1976] 2 All ER 5, CA (refd)
Farrington v Rowe Mc Bride & Partners [1985] 1 NZLR 83 (refd)
Frame v Smith (1987) 42 DLR (4) 81 (refd)
Hongkong Bank Malaysia v Wexcel Holdings Sdn Bhd [2005] 2 MLJ 616, HC (refd)
Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 1 All ER 474, CA (refd)
Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64 (refd)
Kirke La Shelle Company v Paul Armstrong Company 263 NY 79 (1933) (refd)
Kluang Wood Products Sdn Bhd v Hong Leong Bank Bhd [1999] 1 MLJ 193, FC (refd)
KMC Company v Irving Trust Company 757 F 2d 752 (6th Cir 1985) (refd)
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HC (refd)
Lloyds Bank v Bundy [1975] 1 QB 326, CA (refd)
Marten v Whale [1917] 2 KB 480, CA (refd)
Midland Bank Trust Co Ltd v Hett Stubbs and Kemp (a firm) [1978] 3 All ER 571 (refd)
New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France [1919] AC 1 (refd)
Perwira Habib Bank Malaysia Berhad v Hong Huat Holdings Sdn Bhd & Ors [1991] 2 MLJ 29; [1991] 2 CLJ 906, SC (refd)
Quesnel Forks Gold Mining Co Ltd v Ward [1920] AC 222, PC (refd)
Reading v The King [1949] 2 KB 232, CA (refd)
Sheppard v Fett and Textiles of Australia Ltd (1931) 45 CLR 359 (refd)
Smith v Butler [1900] QB 694, CA (refd)
State National Bank of El Paso v Farah Manufacturing Co 678 SW 2d 661 Tex Ct App 1984 (refd)
Tai Hing Cotton Mill Ltd v Lim Chong Hing Bank Ltd and Others [1985] 2 All ER 947, PC (refd)
Trans Trust SPRL v Danubian Trading Co Ltd [1952] 1 All ER 970, CA (refd)
UBAF Ltd v European American Banking Corporation [1984] 2 WLR 508, CA (refd)
White and Carter (Councils) Ltd v McGreqor [1962] AC 413, HL (refd)

Legislation referred to

Sale of Goods Act 1893 [UK]

Lim Kian Leong (Tan Keng Teck with him) (Lim Kian Leong & Co) for the plaintiff.
Yoong Sin Min (Kong Chia Yee with her) (Shook Lin & Bok) for the defendant.

Zainun Ali J:

[1] The present suit which revolved around the plaintiff's project in Ampang known as 'Ampang Galaxy Shopping Centre' ('Galaxy Ampang'), saw a protracted trial lasting twenty three (23) days. Originally the plaintiff filed a Suit No D2–22–665 of 2005 and the defendant filed its suit in D22–443 of 2006.

[2] Suit No *D2–22–665 of 2005* ('Suit 665') is the plaintiff's claim against the defendant for allegedly breaching its duty to act in good faith in the conduct of facilities granted by the defendant to the plaintiff. The alleged breaches, inter alia, included the defendant's refusal to allow drawdown of RM359,096.33 to the plaintiff in 2000.

[3] Suit No *D2–22–443 of 2006* ('Suit 443') is the recovery action by the defendant against the plaintiff and its guarantor, one Lee Kam Yoong for repayment of the amounts under the facilities. The plaintiff filed a counterclaim in Suit 443, inter alia, seeking various declarations for the discharge of the security held by the defendant pursuant to the facilities, including the assignment of the security land on which is sited the building Galaxy Ampang ('the project land'). The two suits were consolidated and heard together.

[4] The plaintiff raised a cause of action which was underlaid with issues of contract and tort. The plaintiff marshalled several allegations of breaches of contract which in totality constituted a breach of legitimate contractual expectation (paras 52—54 statement of claim) against the defendant and co-lenders. The litany of the defendant's alleged breaches run the gamut – from its refusal to allow the plaintiff a further drawdown of RM359,096.33; the defendant's alleged failure to uplift the fixed deposit to make good the alleged arrears of interest owed by the plaintiff; the defendant's inordinate delay in providing approval for redemption; the defendant's alleged mala fides in granting further installment to the defendant's delay in the disbursement of the advance payment and creation of a bank guarantee of RM56,000. These allegations were not only refuted by the defendant and the co-lenders, they were in fact countered in their counterclaim against the plaintiff.

[5] This court will discuss the opposing contentions of the parties and test all these against the oral and documentary evidence to ascertain whether they stand up to scrutiny.

[6] Thus a good starting point would be to consider the circumstances surrounding the nature of the parties' relationship with each other in the obtaining of the facilities, where they stand in the factual and legal contexts'; and the actions and the approaches taken by all parties concerned, since at the heart of this matter lies the issue of breach of a contractual, tortious and professional duties, which the plaintiff contended is owed to them. The question of remoteness of damages is also in contention.

[7] The plaintiff called four witnesses (one of whom was a witness from the defendant bank who was subpoenaed by the plaintiff). The defendant called six witnesses. This court assessed the testimony and demeanour of each and every one of them. Thus both oral and documentary evidence have been fully appraised. Though this court had delivered its broad grounds of decision, parties had written in to request this court for the full grounds of judgment.

[8] At the outset it was in contention by the defendant that the trial would only relate to liability and that damages (if any) were to be assessed later. However from the submissions of the defendant's counsel it was clear that the question of damages was not precluded at trial and these questions were well within the parties' contemplation as it was dealt in the testimonies of the respective parties' witnesses. Thus I gave my decision with issues of liability and part of the quantum in mind.

THE BACKGROUND OF THE CASE

[9] The plaintiff is a developer who acquired a piece of land in the Mukim of Ampang, Selangor ('the said land') in 1994. The plaintiff initiated development on the said land whereby a shopping podium (Phase I) and one block of office tower and one block hotel suite (Phase II) ('the project') were to be developed.

[10] The first defendant (Aseambankers Malaysia BHD or 'ASEAM') and the second, third and fourth defendants are banking institutions having respective places of business in Malaysia. The second, third and fourth defendants are collectively termed as 'co-lenders'.

[11] In the initial stages, the plaintiff secured a project financing facility from Bank Kerjasama Rakyat Malaysia Bhd (BKRB) to assist them in the development and construction of the said project.

[12] Then on or about early 1996, the plaintiff approached the defendant to help arrange a refinancing of its loans for purposes of completing the development and construction of the project.

[13] In view of the large amount of monies involved, the defendant then considered the possibility of syndicated lending.

[14] Syndicated lending or loan syndication is an arrangement whereby two or more banks constituting a consortium of banks or other financial institutions, get together to contribute a percentage share towards the syndicated loan. This often happens when the borrower needs to borrow more money than a single bank wishes or can afford to lend. Such a loan syndication is normally coordinated by a manager or lead bank.

[15] The lead bank assumes different roles in the formation of the loan.

[16] At the pre-contract stage the lead bank plays an active role in the formation of the syndicate. As a manager, the lead bank's role includes soliciting syndicate members for the loan, preparing the information memorandum and negotiating the terms of the loan agreement. After that ie in the post contract phase, the manager (lead bank) coordinates the loan payments and communicates between the borrower and the syndicate.

[17] It is important that the role of each party to the syndicate is explained. The lead bank (as manager) in the pre contract phase is normally responsible for the preparation of the information memorandum in conjunction with the borrower. The lead bank will negotiate a loan agreement with the borrower. Once the terms of the draft loan agreement are agreed upon, the information memorandum will be circulated among the potential co-lenders (participants). Questions may be raised by the co-lenders and the manager may deal with them. Once the borrower, the manager and potential co-lenders approve the draft agreement, the agreement is signed.

[18] Theoretically, once the loan agreement is signed, the lead bank itself or some other bank, is replaced by an agent. Usually both functions (as manager and later as agent) is performed by one and the same bank. The agent is responsible for managing, structuring and placing the loan.

[19] The duties of the agent are usually set out in the loan agreement and are administered in return for a compensatory fee. These duties may be grouped into contractual and ancillary duties.

[20] The contractual duties of the agent include:

(a) ensuring that the borrower has complied with any condition precedent;

(b) acting as a paying bank in respect of transfers of funds between the borrower and the syndicate;

(c) monitoring the covenants of the loan agreement and

(d) taking appropriate action in the case of default by the borrower.

[21] The agent also performs ancillary duties, such as receiving formal notices from the borrower, including the borrower's financial statements and reports.

[22] The co-lenders on the other hand having advanced their quota of the loan, usually take a more passive role and rely largely on the competence of the agent to look after their interests.

[23] A critical question in such a syndication lending is — what is the relationship between the agent and the co-lenders and between the agent and the borrower?

[24] Can the agent be regarded as a fiduciary of the syndicate participants (both of the co-lenders on one hand and of the borrower on the other)?

[25] The agreement would usually contain words to the effect that 'nothing in this agreement constitutes the agent as trustee or fiduciary …' But whether courts would uphold this provision is dependent on how they construe the agreement and whether emphasis is given to the substance of an agreement rather than its form.

[26] The above fact is important in this case. In preparing the information memorandum some authorities have shown that the manager bank is held as the fiduciary of the lender banks regarding the preparation of the information memorandum, at least where its function resembles that of a trustee acting as the debenture holder of a company. This was the situation in *UBAF Ltd v European American Banking Corporation* [1984] 2 WLR 508 — where it was confirmed that it is possible for the lead bank to simultaneously act as the borrower's agent and as a fiduciary of the lender banks.

[27] In the instant case, at the material time, the defendant was the manager and then it became the agent for the syndicated loan. The defendant in this case, prepared an information memorandum on the project based on the strength of the valuation report prepared by a valuer, Messrs Khong & Jaafar at the stage of construction of Phase I. It took the view that the project was profitable and viable, as evidenced in the said memorandum which, inter alia, declared that:

> ... The proposed development is strategically located within the commercial and shopping area of Kuala Lumpur …

[28] Based on the above, the defendant then sent out the information memorandum to several selected banking institutions. After the defendant obtained responses from the various banks concerned, it agreed to grant a loan syndication facility to the plaintiff, with the participation of other banks (the co-lenders), amounting to RM62m ('the loan facility'), which was categorised as follows:

(a) Revolving credit facility of RM4 million and

(b) Bridging loan of RM58 million.

[29] The lender banks and co-lenders in the loan syndication and their respective commitments are as follows:

(a) The defendant (as the lead and agent bank), with a commitment of RM4 million for the revolving credit facility;

(b) Kewangan Bersatu Bhd ('RHB') committed to RM20 million for the bridging loan;

(c) Affin Finance Berhad ('Affin') committed to RM20 million for the bridging loan;

(d) Bolton Finance, now known as Alliance Finance Berhad ('Alliance'), committed to RM18.5 million for the bridging loan.

[30] The syndicated loan arranged by the defendant above for the sum of RM62m was formalised by the execution of a facility agreement dated 27 June 1996 ('the facility agreement'). Pursuant to the terms and conditions of the facility agreement, the defendant as agent was paid agency fee to manage and monitor the facilities, for and on behalf of the plaintiff. The loan facility was to be disbursed in the following manner:

(a) Tranche A for the sum of RM28.5m to be disbursed for the redemption of the BKRB loan;

(b) Tranche B for the sum of RM15m for the construction cost for Phase I of the project;

(c) Tranche C for the sum of RM15m for the construction cost for Phase II.

[31] Tranche A and B were fully disbursed by the defendant and the co-lenders. During the period of 1996–1998, the plaintiff made several payments to the defendant and the co-lenders, and out of the disbursed amount, the defendant and the co-lenders were owed an outstanding balance of RM27.6m.

[32] A list of securities (see attachment) was secured by the defendant and the co-lenders. On or about 18 December 1997, the plaintiff on its own volition cancelled Tranche C as it did not intend to proceed with Phase II of the project due to the Asian economic crisis. The plaintiff had also indicated that PNCK, its contractor, had reneged from its initial agreement to provide the plaintiff 30% of the project cost, resulting in the plaintiff being unable to complete the construction of Phase I of the project (with a certificate of fitness of occupation) on schedule.

[33] It is the plaintiff's case that at the material time, the plaintiff stated that it had completed 70%–80% of Phase I of the project (retail and shopping centre) and had obtained the architect's certificates (Akitek Akiprima) certifying 95% completion of certain individual units at Phase I of the project and that the plaintiff was duly servicing all necessary payments due to the defendant and the co-lenders (para 9, statement of claim.)

[34] However the above facts were denied by the defendant in its statement of defence. With regard to the plaintiff's contention that it had completed 70%–80% of the construction of Phase I of the project, there was denial of the same by the defendant. However my attention was drawn to the minutes of a meeting which the defendant had arranged between itself, the plaintiff and Pengurusan Danaharta Nasional Bhd ('Danaharta') on 14 October 1998. At para 4 of the said minutes, it was stated (by the defendant) that:

> ... we understand from Shencourt that to date, 87% has been completed.

[35] This was stated in relation to Phase I of the project. In the light of the above, it is my view that it would be difficult to accept the fact that the defendant (as a reputable bank) would have minuted it as such (being 80–85% completed) should it entertain any doubt as to the truth of this statement. If there is any doubt it should then put its doubt in clear terms, either as a rebuttal or disclaimer. In the light of the above, the defendant's denial of para 9 of the plaintiff's statement of claim warrants scrutiny.

[36] The plaintiff then approached the defendant to restructure the loan facility. The plaintiff wanted to complete Phase I of the project. The plaintiff also wanted the defendant to provide additional facility to complete the new Phase II by way of reinstating the surrendered Tranche C of the bridging loan. This is the first restructuring asked for by the plaintiff. The plaintiff's requirement for the additional facilities was for an additional RM17m to be used in this manner:

(a) RM10m to be utilised for the construction of Phase I;

(b) RM7m to be utilised for the construction of Phase II.

[37] This 'first restructuring' was embodied in a supplementary agreement dated 7 December 1999 ('the supplementary agreement') whereby the defendant and the co-lenders had agreed to do the following:

(a) to restructure the terms and conditions of the facility agreement;

(b) to capitalise the outstanding interest as principal; and

(c) to reinstate the availability of Tranche C of RM15m for the purpose of completing Phase I.

[38] This resulted in the request by the plaintiff to the defendant to reinstate Tranche C and additional loans to complete Phase I and revise Phase II of the project.

[39] However the defendant did not immediately agree with the plaintiff's request for reinstating Tranche C and the additional facilities. Instead, the plaintiff was asked by the defendant to approach Danaharta. However nothing came out of the meeting the plaintiff had with Danaharta since Danaharta's proposals were not agreed to by the plaintiff. Further the defendant could not force the plaintiff to deal with Danaharta as at the material time the plaintiff was not in default of its obligation under the facility agreement.

[40] However, at the material time, one of the co-lenders ie KBB had suffered severe financial constraints and it eventually buckled under. KBB was later placed under the management and supervision of the central bank or Bank Negara Malaysia ('BNM'). (This fact is also crucial in terms of how the facilities granted to the plaintiff were supervised and managed in the crucial year of 2000).

[41] It is the plaintiff's case that the defendant's and the co-lenders' reluctance to give further financial support to the plaintiff culminated in BNM giving the defendant and co-lenders a directive to provide additional facilities to the plaintiff to complete the construction of Phase I and the revised Phase II of the project. The plaintiff said that this directive is consistent with *BNM's policy* in respect of given loans to commercial developments, which was *that banks ought to continue to provide financial support for commercial developments which were near completion*. (Emphasis added.)

[42] The facts above were later confirmed by DW1 in his testimony. This fact is important.

[43] However it is the plaintiff's case that the defendant and the co-lenders failed to comply with BNM's directive to assist the plaintiff. The plaintiff was instead instructed by the defendant to deal directly with the co-lenders on the

issue of granting additional financial assistance to the plaintiff and secure their participation in the reinstatement of Tranche C and also the granting of the additional facilities. The plaintiff contended that the defendant's indifference towards its plight was inconsistent with its duties as the plaintiff's agent in the syndication.

[44] In any case the plaintiff approached individual co-lenders (see para 27 of Dato' Lee Kam Yoong's witness statement) ie Kewangan Bersatu Bhd (KBB), Affin Finance Bhd (AFB) Bolton Finance Bhd (BFB) and ASEAM for the said additional facilities.

[45] Finally due to much exertion on the part of the plaintiff, and in view of the BNM's directive, the defendant and the co-lenders agreed to reinstate Tranche C and provide additional facilities to the plaintiff to complete Phase I and to launch the revised Phase II of the project. However Bolton Finance Bhd BFB required the plaintiff to place RM2m in fixed deposits with BFB as security, which the plaintiff did. According to the plaintiff (through Dato' Lee), the creation of this fixed deposit was made known to both the defendant and BFB. Upon the placement of this fixed deposit the facility was granted.

[46] These were embodied in the said supplementary agreement of 7 December 1999. In addition, an additional facility agreement dated 17 December 1999 was also executed by the plaintiff, defendant and the co-lenders whereby an additional bridging facility of RM17m was granted for:

(a) Additional Tranche A for RM10m to be utilised for construction of Phase I; and

(b) Additional Tranche B for the sum of RM7m to be utilised for the construction of Phase II.

[47] It is the plaintiff's case that it had complied with the conditions precedent to facilitate the drawdown of RM10m of the reinstated Tranche C.

[48] On or about July 2000, the plaintiff requested the defendant to drawdown the sum of RM359,096.33 from the bridging loan for the reinstated Tranche C. However the defendant refused to allow the drawdown. The defendant's response was that it refused the plaintiff's request due to the plaintiff's non fulfillment of the precondition of the supplementary agreement. Or putting it in another way, the condition precedent for the release of the loan (under the supplementary agreement) has not been met by the plaintiff. The defendant's and co-lender's explanation was this.

[49] They alleged that the breach occurred when the plaintiff was in default of the interest payments due to them under the supplementary facilities

agreement and that there was non-compliance with the debt service reserve account (DSRA) requirement in which the plaintiff failed to maintain sufficient monies in the DSRA. In fact, the defendant's letter of 26 March 2000 clearly stated that:

> However, future drawdown shall only be allowed subject to compliance of the following conditions:
>
> (i) Regularization of overdue interest;
>
> (ii) Deposit the required amount in the DSRA.

[50] Thus in July 2000, the defendant and the co-lenders announced that due to the above reasons, they were entitled to withdraw themselves from their financial commitment under the said agreement. This meant that the defendant and the co-lenders withheld the drawing down of the facilities in July 2000.

[51] The defendant however contended on 13 July 2000 that even in the period before the year 2000, the plaintiff had already *been in default* of its obligation under the facilities agreement. It would appear that the defendant took the position that the plaintiff was rescued from the brink of financial disaster only by the grace and favour of the defendant and the co-lenders.

[52] Whether the defendant's contention above is true or otherwise will be seen subsequently.

[53] The plaintiff alleged that there was deliberate and malicious mismanagement of the facilities by the defendant and the co-lenders in contriving a default of the interest payments due from the plaintiff under the facilities, resulting in the facilities being withheld by the defendant and the co-lenders.

[54] Is this allegation true? We shall soon find out.

[55] The defendant and the co-lenders alleged that even if all monies collected from the project was applied towards interest payment, the plaintiff would still be in default since the debt service reserve account ('DSRA') maintained by the defendant could not immediately be utilised to cover the outstanding interest until and unless there was an unanimous agreement by all the co-lenders on this issue. The defendant and co-lenders thus refused, failed and/or neglected to allow the plaintiff to continue to drawdown the loan facility.

[56] Thus in view of the above, the defendant and the co-lenders contended that the plaintiff's non-payment of interest and non-compliance with the DSRA requirement amounted to a breach and it constituted the non-fulfillment of the plaintiff's obligation to comply with the conditions precedent for continued drawdown of the facilities.

[57] It is the plaintiff's case that the defendant's refusal to allow continued drawdown could not have come at a worse time, since the project was then at a critical period. The plaintiff had already launched Phase II of the project where the plaintiff had collected deposits from the end-purchasers of Phase II. The plaintiff had also intended to secure payments from the end purchasers/financiers of Phase I and II to ensure the continued repayments of the loan to be effected to the defendant and co-lenders arising from the facilities.

[58] Meanwhile, the defendant and co-lenders by letter of 26 July 2000 demanded that the plaintiff appoint a consultant to re-evaluate the feasibility of the revised project ('feasibility report'). After much discussion, the plaintiff (with the defendant's approval) appointed Messrs Howarth Mok and Poon ('the consultant') to prepare a feasibility report.

[59] It is the plaintiff's case that the consultant prepared two feasibility reports dated 20 October 2000 and 17 November 2000, both of which were inclined favourably towards the proposition that the plaintiff's revised project is viable and are therefore to be continued and completed. The consultant recommended that it was in the collective interest of all parties (ie the plaintiff, defendant and co-lenders) that the construction and development of the revised project, in particular Phase I be completed. The consultant indicated that the market value and force sale value of the revised project was sufficient to repay the loan facility granted by the defendant and co-lenders. This fact is important.

[60] However despite the positive findings of the feasibility reports the defendant failed, refused and/or neglected to allow the plaintiff to drawdown the facility for purposes of completing the revised project. The plaintiff alleged that later the defendant in fact went a step further by imposing onerous conditions on the plaintiff before the plaintiff was allowed to continue to utilise the loan facility.

[61] The plaintiff further alleged that the above act of the defendant's was a deliberate act, calculated to further deprive the plaintiff in continuing with the construction of the revised project.

[62] It is the plaintiff's case that the defendant had impliedly and expressly

breached its obligations to make the funds available to the plaintiff under the reinstated Tranche C of the bridging loan. The plaintiff contended that it had directly caused the construction and development of the revised project to cease, causing it to suffer irreparable loss and damage.

[63] In fact it is the plaintiff's case that the defendant and co-lender's allegation of the non-servicing of the interest was unreasonable and unwarranted because the plaintiff contended that the alleged non-payment of interest could have been avoided. This is because BFB had secured a fixed deposit of RM2m from the plaintiff. The creation of this fixed deposit was made *known* to the defendant and other co-lenders. As such, the defendant and co-lenders were entitled to utilise the fixed deposit for the purpose of settling the alleged arrears in interest due and owing (if at all), under the facilities. In any case, BFB subsequently uplifted the fixed deposit for the sole purpose of repaying the interest due and owing under the facilities. However, the defendant's case is that none of the defendant or co-lenders knew of this RM2m fixed deposit the plaintiff had with BFB or that any of them could uplift it should it be warranted for them to do so. The plaintiff contended that this proved that the defendant and co-lenders were able to allay any default (if at all) and they should have acted upon this to meet any alleged arrears in interest (pp 878–880, 909 and 985–988 of plaintiff's bundle Vol IV.)

[64] It is the plaintiff's case that even before the second feasibility report on 17 November 2000, on 7 November 2000, the defendant had proposed to the plaintiff in a meeting between it, the plaintiff and co-lenders on 6 November 2000, that they were willing to continue their participation in the project only if the plaintiff were willing to allow a profit sharing scheme with the defendant and co-lenders ie a joint venture scheme. The plaintiff's contention was that this proposal was contrary to the provisions of the Banking and Financial Institutions Act 1988. This was confirmed in a letter dated 7 November 2000 issued by the defendant (see pp 872–876 of plaintiff's vol IV).

[65] The defendant denied the above contention. The defendant in fact denied the existence of the minutes which encompass the above proposal. The question is what is the true position? This will reveal itself later in the course of things.

[66] Meanwhile in view of the defendant's failure and refusal to allow the plaintiff to drawdown the facility, the plaintiff had come to a financial cul-de-sac so to speak. It had to find alternative means of financing and completing the construction of the revised project. The plaintiff found one willing financier to assist it in this venture.

[67] Thus on 4 May 2001, the plaintiff notified the defendant that a white

knight was willing to take over the financing of the revised project and the plaintiff proposed to the defendant for a waiver of 30% of the total debts due and owing by the plaintiff. The plaintiff also requested the defendant to waive the liquidated and ascertained damages (LAD) under the loan facility. This was because there was a high exposure of the plaintiff where monies for LAD were due to the plaintiff's purchasers for late completion and delivery of the respective individual properties in the revised project. It is the plaintiff's case that it had, at all material times, informed the defendant of its high exposure of LAD payable to the end purchasers of Phase I of the project. However the defendant refuted this allegation.

[68] The plaintiff had procured letters of waiver from over 70% of the purchasers of Phase I to limit their claims for LAD for late delivery of the individual properties to a fixed total sum of RM10m. But this waiver was subject to the individual properties (in Phase I) being delivered to the purchasers on or before 31 December 2002.

[69] It is the plaintiff's case that the defendant knew not only of the procurement of the letter of waiver, but also of the substantial reduction of the LAD, provided the individual properties in Phase I were delivered on or before 31 December 2002.

[70] However the plaintiff contended that the defendant did not promptly issue a redemption statement for the loan facility which would enable the white knight to refinance the revised project. In fact the defendant took their time in doing so.

[71] It was only on 31 May 2002 that the defendant issued the redemption letter where the redemption sum for the loan facility was fixed at RM35,850,000.

[72] The plaintiff contended that the tardiness of the defendant had directly caused delay in the completion of the project and denied the plaintiff the opportunity to limit its exposure for LAD for late delivery of the individual properties for the revised project to RM10m.

[73] The plaintiff went on further to state that during the course of negotiations between the plaintiff and defendant, the plaintiff was informed by way of a copy of an internal memorandum prepared by the defendant's officers which stated that the defendant and co-lenders were not willing to provide any further financing to the plaintiff for the completion of Phase I of the revised project, since the defendant and co-lenders were over-exposed on their overall lending to the property sector.

[74] It is the plaintiff's case that the defendant and co-lenders in actual fact, had no more funds available to allow further drawdown of the facilities due to their over exposure of loans in the property sector. The plaintiff took the position that the defendant and co-lenders had ulterior motives in refusing the further drawdown; that their refusal to allow the plaintiff to drawdown was not due to the plaintiff's non-compliance of the conditions precedent as stated earlier, but rather due, inter alia, to the reason of their own over-exposure of loans in the property sector. The defendant however, strongly refuted the plaintiff's allegation above.

[75] The internal memorandum has a significant bearing on this case and this will be expanded on later in this judgment.

[76] After meeting with the plaintiff, the defendant proposed two options of settlement to the plaintiff subject to the approval of the co-lenders' respective approving authority.

[77] The two (2) options were, namely:

(a) To redeem the entire facilities, where in the defendant and co-lenders are to waive the capitalised and normal interest but the principal sum had to be fully settled by the plaintiff. At the material time, the principal sum due and owing was RM34,054,020.64 and the total outstanding sum of the facilities inclusive of interest was RM39,837,754.97;

(b) To defer the payment of the outstanding interest, principal and future interest for a period of twenty four (24) months wherein the plaintiff is to secure a bank guarantee in favour of the defendant and co-lenders for a equivalent sum. (see pp 904–906 plaintiff's bundle, vol IV.)

[78] The plaintiff on 12 June 2001 contended that it informed the defendant that it opted for the first option which was to pay the principal amount of RM34,054,020.63 as full and final settlement. However on 12 July 2001 and 6 August 2001, the defendant requested for information of the white knight and details of the manner in which the redemption sum was to be paid by the plaintiff to the defendant and co-lenders.

[79] Even the defendant's then Chairman Tan Sri Mohamed Basir Ahmad during a meeting between the defendant and the plaintiff on 25 July 2001 raised a query on the white knight's identity and method of redemption.

[80] It is the plaintiff's case that to avoid further delay, it revealed to the defendant that the white knight was a company known as Polygrand Construction Sdn Bhd.

[81] Then again on 16 August 2001, the defendant demanded information on the method and manner of settlement of the redemption sum by the white knight and/or the plaintiff and on 21 August 2001, the plaintiff informed the defendant that the settlement of the redemption sum shall be by way of a lump sum payment.

[82] To this, the defendant replied on 27 September 2001. It finally issued a redemption statement on 27 September 2001 to the plaintiff for the entire outstanding sum which amounted to RM41,482,419.47 which included capitalised and normal interest.

[83] It is the plaintiff's case that the above redemption statement was clearly in breach of their earlier agreement to fix the redemption sum at RM34,054,020.64.

[84] It is also the plaintiff's case that the defendant had reneged on its earlier proposal to waive the capitalised and normal interest. The problem is exacerbated when the plaintiff contended that the defendant and co-lenders demanded the plaintiff to settle the entire indebtedness failing which legal proceedings would be commenced against it. By then, Polygrand (the white knight) lost interest in the project. Fortunately its place was taken up by Malaysian Alliance Assurance.

[85] To avoid any more delays, it is the plaintiff's case that since it obtained agreement from Malaysian Alliance Assurance Bhd (MAA) to help take over the entire financing for the project from the defendant and co-lenders, and to complete work on Phase I as soon as possible, the plaintiff proposed to the defendant that the redemption sum be fixed at RM37m (which included an amount of interest).

[86] Then almost a year later (since the plaintiff first wrote for the redemption sum on 4 May 2001), on 3 May 2002, the defendant finally notified the plaintiff that the redemption was to be fixed at RM38.5m, based on a majority vote by the defendant and co-lenders. The defendant informed the plaintiff that the delay was due to the failure of BFB to revert promptly to the defendant on the proposal (note: The defendant finally conceded that the agreement of the co-lenders could be obtained by a majority vote and not necessarily on a unanimous vote as they had argued earlier).

[87] In view of the earlier impasse between the parties, Bank Negara Malaysia intervened and directed that:

(a) The defendant and co-lenders should continue to participate in the financing of the revised project;

(b) That the white knight (MAA) should participate as a fresh party (by way of pari passu) in the loan syndication by injecting fresh financing into the revised project.

But the white knight was not allowed by BNM to re-finance the entire facilities, but that it could finance up to the amount of RM35m only.

[88] The MAA then notified that the plaintiff, defendant and co-lenders that it was willing to participate in the loan syndication by injecting RM35m *and that the same was sufficient for the plaintiff to complete the construction of Phase I of the revised project*. (Emphasis added.) This is an important fact.

[89] The plaintiff's contention was that at that point in time when the above statement was made, the defendant and co-lenders had not imposed any condition that a portion of the RM35m was to be utilised as a partial redemption of the loan facility to the defendant and co-lenders. Thus, the RM35m would have been sufficient for the above purpose.

[90] However during the preparation of the loan documentation, the plaintiff contended that the defendant and co-lenders had at the 11th hour, unilaterally imposed a condition that payment of RM8.5m out of the total financial injection of RM35m is to be made to the loan syndication where it is to be utilised as a partial redemption of the loan facility to the defendant and co-lenders.

[91] It is the plaintiff's case that this imposition of an upfront payment of RM8.5m (as partial redemption) had placed the plaintiff in a quandary since this would result in a shortfall of funds on its part to complete the construction of Phase I.

[92] The plaintiff also contended that this shortfall made it vulnerable and in its desperation, there was nothing it could do but to go along with the defendant's proposal. Any protestation would be critical, even fatal, since it would cause further delay.

[93] A second supplemental facility agreement dated 30 January 2003 was drawn up, where MAA was allowed to participate in the loan syndication by injecting and disbursing to the plaintiff the sum of RM35m in the following manner —

(a) RM8.5m shall directly be disbursed to the defendant and co-lenders being partial redemption of the loan facility; and

(b) the balance of RM26.5m shall be released to the plaintiff for the sole purpose of completing the revised project, in particular Phase I.

[94] The plaintiff's contention was that whilst it could complete the construction of Phase I on or about 21 October 2003 as represented by the plaintiff to the defendant and co-lenders and MAA in accordance with the terms, conditions and covenants of the second supplemental agreement, the imposition of RM8.5m for partial redemption had caused a shortfall of funds to complete the said project.

[95] Thus it is the plaintiff's case that the RM8.5m upfront payment demanded by the defendant and co-lenders was unreasonable and a deliberate act of sabotage on their part.

[96] In any case, the plaintiff, defendant and co-lenders executed a formal agreement on the participation of MAA in the financing of the project by way of a supplemental facility agreement dated 30 January 2003. ('the second supplementary agreement').

[97] It was agreed that MAA's loan was to be utilised in this manner:

(a) RM8.5m is to be directly disbursed to the defendant and co-lenders being partial redemption of the facilities;

(b) the balance of RM26.5m is to be released to the plaintiff and its contractors for the sole purpose of completing the construction of the project in particular Phase I.

[98] The plaintiff reiterated that the RM8.5m upfront payment caused the plaintiff to suffer a shortfall of funds due to the following:

(a) Payment had to be made towards the relevant authority to secure the approvals required to obtain a Certificate of Fitness for Occupation for Phase I of the project (including newly imposed contribution fees).

(b) Payment had to be made to obtain the land title from the land office; and

(c) Monies had to be taken as initial working capital for the opening and launching of Phase I of the project, the Galaxy Ampang Shopping Centre.

[99] Due to the shortfall of funds, the plaintiff on 3 December 2003 requested the defendant, co-lenders and MAA for an advance payment in the approximate sum of RM5m for the following purposes:

(a) RM2.5m to pay the relevant authorities to secure approvals required to obtain the Certificate of Fitness for Occupation for Phase I of the project; and

(b) Approximately RM2.5m for the pre-opening cost for Phase I of the project;

[100] The plaintiff also sought an extension of the moratorium period for an additional year to negate the plaintiff's obligation of servicing any interest and installment payment arising from the facilities. The plaintiff contended that in the interim period, it would be able to generate and accumulate sufficient income from Phase I of the project within the one year from the date of approval and disbursement of the advance payment.

[101] The defendant, co-lenders and MAA were only agreeable to consider an advance payment for the payments to the relevant authorities to procure the requisite Certificate of Fitness for Occupation to secure the individual document of title for the land, which amounted to RM2,476,748.

[102] However the defendant was willing to consider an extension of the moratorium period for an additional year whereby the servicing of interest for the facility would then commence on 30 April 2005.

[103] On 27 January 2004 MAA notified the plaintiff of their willingness to participate in the advance payment but KBB was not able to participate. The plaintiff contended that the defendant provided no alternative proposal to assist the plaintiff in resolving the non participation of KBB in ensuring that Phase I would be expedited for the benefit of the end purchasers, Co-Lenders, MAA and the plaintiff. In fact conversely, the defendant asked the plaintiff to come up with alternative proposals.

[104] Thus the plaintiff by letters dated 15 March 2004 and 8 April 2004, wrote to the Assistant Governor of Bank Negara to help them.

[105] It was only on 24 May 2004 that the defendant and co-lenders and MAA agreed to participate in the advance payment in the sum of RM2,476,748 to obtain the requisite approval to obtain the Certificate of Fitness for Occupation for Phase I and to secure the title for the land and allowed a further second one year extension of the moratorium period over interest from 30 January 2004 to 30 January 2005.

[106] The plaintiff further contended that at the time it made an application to the defendant for the advance payment, the defendant knew very well that the payments were to be effected to the relevant authorities to secure the Certificate of Fitness of Occupation for Phase I of the project (see bundle E — p 1124).

[107] However the plaintiff contended that the defendant delayed in the disbursement of the advance payment in particular in the issuance of a bank guarantee in favour of Jabatan Perkhidmatan Pembetungan (JPP). The delay in the granting of the advance payment by the defendant, co-lenders and MAA was five (5) months.

[108] The plaintiff contended that the defendant knew as early as 3 December 2003 about the plaintiff's request for the advance payment (bundle E pp 1018–1101).

[109] The plaintiff contended thus by its facsimile memorandum of 8 June 2004, it clearly provided that the defendant shall procure a bank guarantee in favour of JPP for the sum of RM56,200.

[110] However unbeknownst to the plaintiff, the defendant issued an undertaking to the JPP instead. It was only on or about September 2004 that the plaintiff discovered that the defendant had only given an undertaking to the JPP (to pay the deposit RM56,200) which the JPP rejected.

[111] The plaintiff contended that it had no alternative but to make arrangements with Bumiputra Commerce Bank Bhd (BCB) to issue a bank guarantee in favour of JPP. However BCB's pre condition was for the plaintiff to create a fixed deposit for RM56,200 as security for the bank guarantee to be issued to JPP, on the undertaking that the defendant was to disburse such funds from the advance payment to BCB for the purpose.

[112] But the plaintiff contended that the defendant further delayed the matter by writing to the co-lenders and MA for their approval to do so when such approval was totally unnecessary since the co-lenders and MAA were already aware of the requirement on the issue of the bank guarantee to JPP at the time of the application of the advance payment on 3 December 2003.

[113] The plaintiff went on to say that even after receipt of the approvals, the defendant did not immediately disburse to make the advance payment for the purpose of creating a fixed deposit at BCB to procure the bank guarantee in favour of JPP. In fact it is the plaintiff's case that it was at a loss as to why there was delay by the defendant in doing so — and in fact the plaintiff in its desire to expedite matters, even offered to advance the payment (from its directors on the understanding defendant would reimburse) to create the fixed deposit, but even this was rejected by the defendant. In fact the defendant insisted that they will personally deal with bcb on the issuance of the bank guarantee.

[114] The plaintiff pointed out that though the defendant obtained the approvals from the co-lenders and MAA on 22 and 23 September 2004, the

defendant replied to the plaintiff's query on 13 October 2004, regarding the same. Finally it was only on 15 October 2004 that the defendant forwarded the cheque of RM56,200 to BCB to create a fixed deposit as security for the bank guarantee in favour of JPP.

[115] The defendant insisted that the bank guarantee be put in its name. This caused further delay since BCB was only prepared to issue the bank guarantee in favour of JPP once the requisite security documents were executed by the defendant and duly lodged at the companies commission of Malaysia.

[116] However due to the time frame which the BCB said would take a month (to perfect the security document) the defendant was not prepared to execute the security document in favour of BCB and told the plaintiff that it will personally arrange the bank guarantee in favour of JPP.

[117] The plaintiff's reminded the defendant on 28 October 2004 to expedite the bank guarantee.

[118] It was only on 12 November 2004 that the plaintiff forwarded the bank guarantee to JPP, which made it was not possible for the Certificate of Fitness of Occupation to be issued by the end of November 2004.

[119] The plaintiff took issue with the delay since unnecessary interests was incurred by the plaintiff and the end purchasers of Phase I of the project.

[120] Thus due to the abovesaid delay, the plaintiff requested for a moratorium period for an additional year (ie till 30 January 2006), by letter dated 13 January 2004.

[121] The plaintiff contended that the initial moratorium period until 30 January 2005 was redundant in view of the delay in the approval and disbursement of the advance payment (see bundle E pp 1175–1176).

[122] The defendant reverted to the plaintiff by letter of 7 January 2005 requesting it for further information to enable the defendant, co-lenders and MAA to approve the said moratorium request.

[123] The plaintiff by letter of 10 January 2005 furnished to the defendant the required additional information.

[124] Finally on 13 January 2005 the Majlis Perbandaran Ampang Jaya issued a Certificate of Fitness for Occupation for Phase I of the project. This information was conveyed to the defendant on 14 January 2005.

[125] Meanwhile, the defendant and co-lenders pressed the plaintiff for further information. It is the plaintiff's case that this delayed the approval for the moratorium, even though the Galaxy Ampang Shopping Centre was officially launched on May 2005.

[126] The plaintiff's position was that it was critical that it obtain the extension of the moratorium period, since it was attempting to procure tenants to the shopping centre in order to generate income and commence repayment of the facilities and service the interest after 30 April 2006.

[127] Meanwhile the moratorium period expired. Thus on 5 May 2005, the defendant requested the plaintiff to make payment for interest due on 30 April 2005 since the co-lenders could not reach a unanimous decision to allow the plaintiff's request for an extension of the moratorium.

[128] The plaintiff took issue with the defendant for what it regarded as the defendant's unreasonable demand of payment of interest under the facility (on 5 May 2005), when it knew full well that the plaintiff did not have sufficient income from Phase I of project to pay them (the defendant and co-lenders), due to the delay of the project and delay in the opening of the shopping centre caused by the slow disbursement of the advance payment by the defendant.

[129] The plaintiff's case is that the unreasonable demand by the defendant and co-lenders gave it no alternative but to commence this action against the defendant and co-lenders as the losses and damages suffered by the plaintiff were caused by the mismanagement of the availability of the facility by the defendant and the co-lenders.

[130] The plaintiff contended, inter alia, that the delay in the opening of the shopping complex let to 70% of the confirmed tenants deciding not to proceed with the tenancy agreement with the plaintiff.

[131] The plaintiff also contended that the delay had a negative impact on the public's perception of the shopping complex and thus it was difficult for the plaintiff to secure tenants for the said complex.

[132] The plaintiff further contended that two companies ie Ibarat Alam Sdn Bhd and Juta Selatan Sdn Bhd had executed sale and purchase agreements to purchased Lots 03–01 and 03–02 for RM14,580,900 and RM15,624,000 respectively.

[133] But that due to the defendant's and co-lenders' unreasonable demand that the balance purchase price of the sale and purchase transaction was to be

deposited into the project account, the plaintiff and the two companies (Ibarat Alam and Juta Selatan) had to mutually terminate the sale and purchase agreements.

[134] After all has been said and done, it is the plaintiff's case that at some point, the defendant and co-lenders took on an 'obstructive' position vis-a-vis the plaintiff, thus pushing the plaintiff to the edge of a financial catastrophe; that the 'difficult' stance taken by the defendant and co-lenders and the almost impossible demands made on the plaintiff, not to mention the deliberate delays caused, were all calculated to engineer a default by the plaintiff, so that in the course of things, the plaintiff would technically buckle under, paving the way for the defendant and co-lenders to benefit from the plaintiff's freefall.

[135] It is the plaintiff's case that the defendant and co-lenders could achieve their unlawful objective by way of an appointment of a receiver and manager as provided for under the third debenture where cl 12.1 clearly stipulated that once any moneys immediately become repayable, the defendant and co-lenders have the right to appoint a receiver and manager to sell the project for the sole purpose of recovering the loan sum granted to the plaintiff by the defendant and co-lenders.

[136] The plaintiff's case was that the defendant's and co-lenders unlawful objective was stymied when the plaintiff was granted on ex parte injunction. Although the plaintiff was not successful in its bid for injunction made inter partes, the court nevertheless allowed the plaintiff's application for an erinford injunction.

[137] In all of these, the plaintiff's position is that this is a case where the plaintiff had borrowed money in good faith from a syndicate of banks managed by the defendant, where the plaintiff relied on the reasonable belief that the defendant would manage the loan in good faith, in a fair manner and in accordance with the highest professional standards of the banking industry and in accordance with the banker's contractual obligations; that the defendant was in breach of its contractual obligation, going against the professional standards of the banking industry and had taken an unfair advantage of its position of dominance over the plaintiff; that the defendant and co-lenders by so doing had been unfair, made unlawful demands of the borrower, when they knew full well that the problems of the plaintiff arose from their own actions, motivated as it were, by bad faith and ulterior motives and that they were in breach of their duty as bankers.

[138] Whether these damning allegations are true or otherwise remains to be seen.

[139] The defendant and co-lenders on their part contended that it was a supreme act of bad faith on the plaintiff's part in instituting action against the defendant and co-lenders after all they had done to accommodate the plaintiff so that it could complete its project.

[140] It is the defendant's case that the plaintiff's cause of action is only one of breach of duty of good faith. Counsel for the defendant submitted that a general duty of good faith owed to the plaintiff is untenable and unsustainable since the ambit of 'good faith' is uncertain in terms of enforceability of contractual terms between the parties (see Chitty on *Contracts* (29th Ed), Sweet & Maxwell 2004 at pp 3–6).

[141] It is also the defendant's case that the agent bank (the defendant) is the agent of the lenders and not that of the borrower's (see *Encyclopedia of Banking Law* at p 11).

[142] See also cll 33.1, 33.2, 33.3 of the supplemental facility agreement of 7 December 1999 (pp 210–211 bundle b), which provide that the agent is to act solely as agent for the lenders.

[143] The defendant's further submission is that even if there was such duty of good faith owed by the defendant to the plaintiff in tort, it cannot be greater than its obligations in contract. Counsel for the defendant cited *Tai Hing Cotton Mill Ltd v Lim Chong Hing Bank Ltd and Others* [1985] 2 All ER 947 where the Privy Council held that in a banker and customer relationship, the parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract.

[144] The defendant's case is also that the plaintiff's pleadings do not allege any breach of contractual terms by the defendant.

FINDINGS OF THE COURT

[145] The core issue to be determined by this court is whether the defendant and co-lenders were in breach of its contractual, tortious and professional duties to the plaintiff. An imperative corollary is whether the defendant and co-lenders owe any duty to the plaintiff and if so, whether they had breached that duty. Thus it is important to determine at the outset of the transaction how the relationship between the lead bank, participating banks and borrower is classified. This will have impact on the structure of the participation agreement as well as the liabilities of parties.

[146] As with normal straight forward banking transactions, syndicate lendings are also open to liability claims filed by borrowers against lenders. Lenders can be and are often held liable for breaching written, oral and implied contracts or agreements.

[147] It is my view that every contract includes an implied covenant of good faith and fair dealing. This means that lenders must be honest in fact and observe the reasonable commercial standards of fair dealing that are standard in the industry.

[148] In this syndicate lending, when the plaintiff gives the mandate to the defendant to procure prospective lenders with the promise to pay certain fees for the manager's (defendant's) service, an agency relationship arises between the borrower and the manager (see O'Sullivan J in '*The roles of managers and agents in syndicated loans* (1992) JBF26 162').

[149] According to a writer, James R Angell (see *Summer* 2009 Vol 5 of the Bank Counselor) 'a mere lender/borrower relationship does not ordinarily result in a fiduciary relationship between the two. However a fiduciary relationship can arise when a lender offers business advice to a borrower (or steps in to tell the borrower how to run its business) and the borrower acts upon its advice to their detriment'.

[150] On the facts of this case it is my finding that on various occasions, the plaintiff had acted on the 'advice' of the defendant, oftentimes to its detriment.

[151] This is apparent when the defendant directed the plaintiff to deal directly with the co-lenders when the plaintiff wanted additional financial assistance and reinstate Tranche C. The plaintiff had to approach the co-lenders themselves although it pays service fees to the defendant. After much effort, the additional facilities were approved but only after the plaintiff complied with BFB's instruction to place RM2m in fixed deposit with BFB as security. Only then were the supplementary agreement of 7 December 1999 and with additional facility agreement of 17 December 1999 were drawn up.

[152] Even then, after the plaintiff's initial drawdown of RM7,734,420.64 under the additional facility agreement, the next drawdown was rejected on grounds that the plaintiff had failed to comply with the conditions precedent. (More of this later.)

[153] The defendant then instructed the plaintiff to appoint a consultant to re-evaluate the feasibility of the revised project. The plaintiff did. However despite the positive report given by the consultant the defendant rejected the consultant's report.

[154] So in this regard, despite the plaintiff taking the defendant's 'advice' and acting upon it, the defendant's rejection of continued drawdown was detrimental to the plaintiff's revised project. As alluded to earlier in the interim period, the plaintiff had procured letters of waiver from over 70% of the purchasers of Phase I to limit their claims for liquidated and ascertainable damages for late delivery of the individual properties to a fixed total sum of RM10m, subject however to the said properties being delivered on or before 31 December 2002.

[155] Though the transaction between the plaintiff and defendant and co-lenders can be said to be arms-length, there are elements of 'undertaking' and 'vulnerability' which are indicative of the existence of a fiduciary relationship. Not since *Boardman v Phipps* [1967] 2 AC 46, has much effort, both judicial and academic, been expended on searching for a definitive fiduciary principle.

[156] Although cases such as *UBAF Ltd v European American Banking Corporation* and *Natwest Australian Bank Ltd v Tricontinental Corporation Ltd* (Supreme Court of Victoria BC 9300770, 2493) — (in article by Charles Qu [2000] Bond Law Review 86]) take the position that the fiduciary relationship relates more towards the relationship between the lead bank (the defendant in this case) and the co-lenders, rather than that between the defendants and the plaintiff, there is much to be said regarding the lender's duty to the borrower (plaintiff) to act in the borrower's best interest. The lender's failure to do so can result in both compensatory and punitive damages (see *James R Angell*).

[157] The issue of trust or confidence is another element which indicates the relationship is one involving a fiduciary and beneficiary. A fiduciary relationship may be found where the lender exercises control over the borrower whenever the borrower has trust and confidence in the lender and where the borrower is in a position of dependence, inequality or lack of knowledge.

[158] In *Farrington v Rowe Mc Bride & Partners* [1985] 1 NZLR 83, Mc Mullin J observed that:

> ... A fiduciary relationship exists whenever there is a relationship of confidence such that equity imposes duties or disabilities upon the person in whom the confidence is reposed in order to prevent the possible absence of confidence.

[159] In *Reading v The King* [1949] 2 KB 232, Asquith LJ had said:

> a consideration of the authorities suggest that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property including intangible property as for instance confidential information and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him and not otherwise and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on is behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available …

[160] The above fact pattern fits in snugly with the instant case as clearly illustrated above.

[161] Even if the categories of fiduciary relationships are varied and correspondingly, the duties to the fiduciary vary with the circumstances which generate the relationship, it is now a truism that the scope of the fiduciary duty must be fashioned according to the facts and nature of the relationship.

[162] In the instant case, it can be seen that the plaintiff placed trust and confidence in the defendant's ability to coordinate and facilitate the lending activities. However both the Australian and the New Zealand Courts of Appeal had held that the trust and confidence test is neither necessary for, nor conclusive of, the existence of a fiduciary relationship.

[163] As illustrated by Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64, trust and confidence are not conclusive of the existence of a fiduciary relationship. However, it is my view that the existence of a fiduciary relationship between the plaintiff and defendant is not precluded merely because the transaction (even if trust and confidence exist) involves an arms length transaction. Other elements such as that of 'undertaking' or 'vulnerability' exist in the instant case, which are also indicative of the existence of a fiduciary relationship.

As identified by Wilson J in *Frame v Smith* (1987) 42 DLR (4) 81:

> The third characteristic of relationship in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.

[164] It is my view that the plaintiff in this case was placed in a vulnerable position on a number of occasions, not least with regards to the question of making good the loan amount. Firstly the plaintiff, after it had secured a white knight to assist in its loan repayment, sought the redemption sum from the defendant.

[165] To begin with, as had been alluded to earlier I find that the defendant has caused an enormous amount of delay in issuing the requisite redemption statement. Questions were still asked of the plaintiff by the defendant, queries were still made, even after answers were posted. Due to the provisions in the agreements and variables found in the loan itself, it was imperative that delays be minimised. Factors such as the possibility of the white knight changing its mind to rescue the plaintiff and the spectre of the LAD made time a very critical factor. All these delays by the defendant were unnecessary, all the more when the defendant *had knowledge* of the procurement of the letters of waiver and *was aware* that the plaintiff's exposure to LAD for late delivery of the individual properties would substantially be reduced provided the revised project was completed on or before 31 December 2002. (Emphasis added.)

[166] Thus, when the final outcome was that the much reduced amount to be given by the white knight fell down further to RM35m (from the initial amount of RM38.5m) and even this was to be further reduced by a cut of RM8.5m which was asked for by the defendant as upfront payment, the plaintiff's vulnerability was never more stark. The plaintiff had to accept that reduced amount, since any protestation on its part would result in further delays.

[167] I find that the conduct of the defendant as manifested above, had directly caused the delay in the re-commencement of completion of the project and denied the plaintiff an opportunity to limit its exposure for LAD for late delivery of the individual properties for the revised project to RM10m. In this, the plaintiff had little choice but to accept the terms as imposed by the defendant.

[168] In this too, there is an 'inequality of bargaining power' of the type as described succinctly by Lord Denning in *Lloyds Bank v Bundy* [1975] 1 QB 326 at p 339. He said:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of

> the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points.

[169] In the instant case, the plaintiff being in almost dire straits, knowingly consented to an improvident bargain. Had it any choice? I think not.

[170] Thus on the facts, I am satisfied that the defendants were in a fiduciary relationship with the plaintiff and had not only not shown a heightened standard of care, it had in fact manifested bad faith and unfairness in the exercise of their duties as lenders towards the plaintiff. (My emphasis.)

[171] In this connection, the related issue of whether claims in tort and contract can exist concurrently is answered.

[172] The former legal position was that where there is an alternative liability in tort, the claimant must pursue his remedy in contract alone (see*Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5). However the decision in cases such as *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp (a firm)* [1978] 3 All ER 5H changed all that. Now tortious and contractual duties can exist concurrently.

[173] This was also the position taken by our Court of Appeal in *Bank Utama (M) Sdn Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148. The learned judge Hasan Lah JCA in the *Bank Utama* case, quoted a passage from *Banking Litigation* by David Warne and Nicholas Elliot QC at p 212, inter alia, as follows:

> ... A Bank, if it assumes an advisory role in relation to a credit, is obliged to give actual accurate and careful advice. In each case it is a question of fact as to whether, first the bank assumed the role of an advisor in relation to the transaction in question, and secondly whether it acted in breach of duty. If and only if these precondition are satisfied does the customer have a claim against the bank for losses caused by negligent advice.

[174] Thus it is my view that it is largely a question of fact whether the defendant and co-lenders assumed the role of advisers (which has been answered) and whether they acted in breach thereof. Thus the next question is:

HAS THE DEFENDANT BREACHED ITS DUTY?

[175] The defendant as the lead bank has many obligations to perform in a syndicate lending. The lead bank collects the payments from the borrower and remits to the participating bank its proportionate share of the payments pursuant to a specific repayment schedule. The lead bank (the defendant) has an obligation to notify the participating bank if there are any changes in the following:

(a) The financial condition of the borrower;

(b) Any material changes in the value or lien status of the collateral securing the loan.

(c) Any requests for changes in the terms of the loan; or

(d) The occurrence of any event or default.

[176] It is with regard to the fourth factor above that I now turn my attention to.

[177] It is the plaintiff's case that the defendant and co-lenders, for no apparent reason refused to allow the plaintiff's legitimate request for the second draw down of the loan under the supplemental agreement. In this, the defendant had indicated that the plaintiff had caused the occurrence of an event of default. The reason for the defendant's refusal was, as stated in their defence, that:

(a) it was due to the Plaintiff's failure to regularise its loans as it was unable to settle its arrears of interest due;

(b) and that the Plaintiff was unable to satisfactorily address the Lenders' concerns over the viability of the Revised Project and the Plaintiff's ability to service the arrears of interns and also the eventual full repayment of all the facilities.

[178] From a reading of the cause papers and making an appraisal of the evidence before me and taking into account the testimony of witnesses, I find that firstly, from a reading of the relevant clause ie cll 12.1, 12.2 and 12.6 of the supplemental facilities agreement dated 7 December 1999, it is critical that a perusal be made of the relevant clauses in the supplementary facilities agreement dated 7 December 1999, as appended below

12 *REPAYMENT/PREPAYMENT*

12.1The Restructured Facilities and the Reinstated Facilities shall be repaid by thirty five (35) equally monthly installments of Ringgit Malaysia One Million Two Hundred and Forty Thousand (RM1,240,000.00) only and a final installment of Ringgit Malaysia One Million Two Hundred and Sixteen Thousand One

Hundred Fifty Nine and Sen Ninety Nine (RM 1,216,159.99) only commencing from the twenty fourth (24th) month from the date of first drawdown of the Reinstated Facilities herein. The Borrower shall have the option of an alternative mode of repayment in the form of progressive redemption as exemplified hereinbelow under Clause 12.2 in the direct order of maturity.

12.2As provided under Clause 12.1 herein before, the Borrower may repay the Restructured Facilities and the Reinstated Facilities by progressive redemption of the parcels contained in the said Building (excluding the Excluded Parcels) in the following manner:-

(i) New Phase I

Description	Redemption sum on selling price of each parcel therein
All sales PRIOR to completion of the New Phase I	23%
All future sales UPON completion of New Phase I	90%
All sales in respect of the Sub-divided Retail Lots and the Exchanged Parcels whether prior to Completion of the New Phase I or future sales Upon completion of the New Phase I.	23%

(ii) New Phase II

Description	Redemption sum on selling price of each parcel there in
All future sales of UP TO thirty per centum (30%) of the parcels contained in New Phase II (excluding the Excluded Parcels).	50%
All future sales of BEYOND thirty per centum (30%) of the parcels contained in New Phase II (excluding the Excluded Parcels).	23%

PROVIDED ALWAYS that the Agent and the Lenders shall reserve all rights to vary the abovesaid redemption sum completely or partially as deemed fir by the Agent and the Lenders and that the selling price of each parcel shall be at the prevailing market value acceptable to the Agent and the Lenders.

FURTHER PROVIDED ALWAYS that the maximum value of the Excluded Parcels shall not exceed the amount reflected on Schedule 9.

12.3Upon compliance of payment of progressive redemption as provided under

Clause 12.2 hereinbefore, the next seventeen per centum (17%) of the sales proceeds arising from the Exchanged Parcels shall be credited into the Debt Service Reserve Account.

12.4The above said progressive redemption shall be utilised for the full repayment of the Restructured Facilities and the Reinstated Facilities and in the event that the abovesaid progressive redemption exceeds the Restructured Facilities and the Reinstated Facilities and/or other amount due herein, the said excess shall be utilised for the purpose of.....

12.6*Repayment of Interest First*

No part of any payment by the Borrower to the Agent and the Lenders shall be treated as a repayment of principal until all Interest. Default Interest calculated as herein provided and due or deemed to be due and accrued shall have been paid.

[179] The defendant's case was that the monies received by the defendant from the end purchasers and/or financiers cannot be applied towards settlement of interest and arrears in interests. Thus the defendant applied the monies received from the end purchasers/financiers towards repayment of principal and not to payment of interest. The defendant claimed that in this case, there was non payment of interest by the Plaintiff, which is a condition precedent to the continuation of the facility and that the arrears in interest amounted to RM1.4m unpaid by the plaintiff. (Which was in arrears of five months by end of August 2000).

[180] In my view it is clear from a reading of the above clauses that any payment received by the defendant ought to be utilised towards settlement of interest payments before principal. In any case, the discretion to apply the monies to either the principal or the interest is solely reposed in the plaintiff.

[181] I do not agree with the submission of learned counsel for the defendant that this interpretation of the clause would give a narrow construction to the agreement. In any case, cl 12.1 is clear in the granting of the option, it being the sole election of the plaintiff to decide whether monies received from the end purchasers/or finances should be applied towards repayment of the principal or otherwise.

[182] I therefore find that in construing the relevant clauses in the supplemental facility agreement, the defendant ought not to have applied the monies received from the end purchasers/financiers towards repayment of principal *unless* the plaintiff had provided an express instruction or confirmation to the defendant to that effect. (Emphasis added.)

[183] As it were, the testimony of defendant's own witness DW1 showed that the plaintiff had never provided any such instruction, express or implied. As such I find it warrants scrutiny as to why the defendant chose to ignore the terms and conditions stipulated in the supplemental facilities agreement of 7 December 1999, when it applied monies received from the end purchasers/financiers not towards payment of interest and arrears in interest (if any), but towards the principal.

[184] I find the defendant's action above to be rather dubious putting it mildly, considering that in para 7 of their defence they admitted that the plaintiff *had* complied with the conditions precedent to the facilities drawdown, but at para 8 of the defence, the defendant however denied this and this is after seven months upon signing the additional facility agreement on 7 December 1999.

[185] It is reasonable to infer that the fact that the defendant did not dispute the sum of RM7,734,420.64 being the first drawdown from the additional facilities (for the construction of Phase I), meant that the plaintiff *had* complied with the conditions precedent. (Emphasis added.)

[186] However the parties' troubles started in July 2000 when the defendant and co-lenders refused the drawdown on the ground that there was a purported arrears in interest owing by the plaintiff.

[187] In my view, the critical period to determine whether there was an arrears in interest would be on 30 June 2000 and not August 2000, as the defendant and co-lenders denied further drawdown of the facilities since July 2000.

[188] It is in my view, an undisputed fact that the defendant and co-lenders had received the sum of RM233,000 and RM610,000 on 14 January 2000 and 12 May 2000 which were utilised by the defendant for principal repayment rather than towards interest repayment. At the material time, there was already arrears in interest repayment by the plaintiff.

[189] Regard must be had to cl 12.6 supplemental facilities agreement dated 7 December 1999, where it was stated in clear terms that *no part of the payment by the plaintiff to the defendant* and co-lenders shall be treated as repayment of principal until all interest and default interest shall have been paid.

[190] At the risk of being repetitive, on a plain reading of the above and the fact that the plaintiff did not give any instruction in the supplemental facilities whether written or verbal to do otherwise (ie to repay principal first instead of

interest), the defendant's application of the repayment of the monies towards the principal does not speak well of the defendant's and co-lenders bona fides.

[191] In fact the plaintiff's claim that the defendant had deliberately mismanaged the said repayments may not be entirely misconceived if one were to compare this supplemental facilities with the previous arrangement with regards payment of the loan sum in the facilities agreement dated 27 June 1996. Clause 10.1.2 of the facilities agreement dated 27 June 1996 clearly provides that the principal will be repaid to the defendant and co-lenders in the following manner:

(a) Thirteen equal quarterly installment of RM4,5000,000 each commencing 24 months from the date of the first drawdown; or

(b) Progressive redemption of the units comprised in the project whichever is the earlier.

[192] Thus the facilities agreement of 27 June 1996 clearly allowed the defendant and co-lenders to immediately utilise such sums received from the end purchasers/financing towards repayment of the principal loan sum.

[193] The arrangement on the utilisation of the payments received from the end purchasers/financers under the facilities agreement dated 27 June 1996 is radically different from the supplemental facilities agreement dated 7 December 1999. In that connection the relevant clauses in the supplemental facilities agreement ie 12.1, 12.2 and 12.6, ought to be interpreted literally and strictly. Should the defendant intend to apply the conventional banking practice as contemplated in the facility agreement of 27 June 1996, then the defendant ought to have adopted the exact mode of payment as spelt out in the terms and conditions as stipulated in the said facilities agreement of 27 June 1996.

[194] In view of the above, it is my finding that the defendant had misapplied the monies received from the end purchasers/financiers in this transaction. Had it not been for the misapplication of those monies, the plaintiff would have been prevented from being in default of the payment of interest in July 2000.

[195] I take this position in the light of clear evidence as illustrated. Had the sums of RM233,000 and RM610,000 been utilised towards the repayment of interest as at 30 June 2000, the purported arrears in interest said to be owed by the plaintiff to the defendant and co-lenders would be RM400,091.81. This is based as it were, on the statement of account of the defendant (bundle E p 248) itself.

[196] The plaintiff's contention to which I agree is, that this purported arrears in interest in the sum of RM400,091.81 (as at 30 June 2000) owing by the plaintiff could easily have been settled in the following manner:

(a) by taking from the DSRA account held by the defendant, which had RM286,647.49 and RM268,154.11 respectively; and

(b) by uplifting the plaintiff's (PW1's) fixed deposit of RM2m with BFB.

[197] The defendant and co-lenders could have exercised their right to set off the arrears in interest by either one of these methods had they been scrupulous in their reading of the supplemental facilities agreement. This is because cl 9.5 of the said agreement reads:

Right to Debit Account

> 9.5 In default of payment of interest as provided in this Supplemental Facility Agreement the Agent and/or the Lenders *shall be entitled* to debit the Borrower's account with the Agent and/or the Lenders or any other bank account opened and maintained pursuant to this Supplemental Facility Agreement wit a sum equivalent to the amount of such interest as provided herein. (Emphasis added.)

[198] The defendant and co-lenders disclaimed any knowledge of the Rm2m fixed deposit which the plaintiff had placed with BFB, saying that it was a private arrangement and that they could not consider it to be a shared security under the syndication arrangement and so the defendant and co-lenders indicated that they could not possibly have utilised this fixed deposit towards the settlement of the interest payments under the facilities.

[199] However, after reading the relevant clauses in the supplemental agreement dated 7 December 1999 and comparing it with the corresponding clauses in the earlier facilities agreement dated 2 June 1996, I find the defendant's and co-lenders' contention above to be misconceived. Clause 8.2 of the facilities agreement of 27 June 1996 states that payment of interest is to be made to ASEAM (defendant) as agent.

[200] However, cl 9.4 of the subsequent supplemental facilities agreement states that the payment of interest was to be made either to ASEAM (defendant) as agent or *lenders*. (Emphasis added.)

[201] The provision in cl 9.5 which states that the defendant and co-lenders have the right to debit *any account* opened and maintained by the plaintiff *with defendant and co-lenders, are not found in the old agreement of 27 June 1996*. (Emphasis added.)

[202] Clause 12.5 of the facility agreement dated 27 June 1996 states that securities created pursuant to the syndicate arrangement shall be in addition and without prejudice to any collateral or securities which ASEAM (defendant) may now or hereafter hold on the account of SSB (plaintiff). A

[203] However in cl 13.8 of the supplemental facilities agreement, it states clearly that securities created pursuant to the syndication arrangement shall be in addition and without prejudice to any collateral or other securities *which ASEAM (defendant) and lenders may now or hereafter hold on the account of SSB (plaintiff)*. (Emphasis added.) B C

[204] Thus, looking at the material amendments incorporated in the supplemental facilities agreement of 7 December 1999, it is my finding that these material amendments by the defendant and co-lenders were made, inter alia, to take into consideration the fixed deposit which was placed with BFB (among others). D

[205] This finding is fortified by BFB's letter of offer (Tab 8 the plaintiff's core bundle p 68) which did not expressly state that the fixed deposit was exclusively for the benefit of BFB. E

[206] In any case, since the fixed deposit was created in BFB's favour, it is the duty and obligation of BFB as a syndicated lender to notify the defendant and other lenders on the creation of this additional security.

In fact, during the cross-examination of defendant's own witness DW1, he admitted and confirmed that: F

(a) it was 'unprofessional' for Alliance (BFB) to fail to inform ASEAM (defendant) and lenders on the fixed deposit; and that

(b) such failure by Alliance (BFB) to notify ASEAM (defendant) and Lenders was against the 'spirit of syndication'. G

[207] The defendant and co-lenders made much of the plaintiff's compliant and compromising stance with regards the defendant's refusal to allow the second drawdown of the additional facilities on account of the plaintiff's arrears of interests. H

[208] But as things were, and as it turned out, the plaintiff was pushed to the wall. The reality of the situation was not lost on the plaintiff. It knew that it was walking on eggshells and in that state of vulnerability it was best to silence any protest, for otherwise its situation could easily turn for the worst. I

[209] The view above is not fanciful, for it was borne out by DW6's testimony during her examination-in-chief. (DW6 is an officer of BFB). Earlier, BFB had set off a portion of the fixed deposit to settle only BFB's portion of interest under the syndication arrangement. The plaintiff could not have objected to BFB's unilateral action or complained to defendant or co-lenders, since BFB might retaliate. As DW6 had testified:

> I believe Alliance Bank (BFB) would not have restructured the facilities, granted any further facilities or allowed any further moratorium for the interest payments if SSB (Plaintiff) had raised all these unfounded allegations against the Lender at the material time.

[210] The above testimony bears out the plaintiff's constraints during the material time. It was not able to do or say anything which might jeopardise the completion of Phase I of the project or prejudice the on-going negotiations on the redemption of the facilities.

[211] In any case, the 'spirit of syndication' as professed by DW1 himself could only mean that blame on BFB's lack of such spirit could not be visited on the plaintiff.

[212] I find that in the said spirit of syndication, the fixed deposit ought to have been shared by the defendant and co-lenders on a pari pasu basis and that if this fixed deposit was utilised towards the interest payment at the material time, the defendant and co-lenders would not have valid or cogent reason to withhold the drawdown of the facilities as requested by the plaintiff.

[213] An interesting adjunct to the issue of the defendant's refusal of the said drawdown, is the issue of the debt service reserve account (DSRA).

[214] The defendant and co-lenders' written submission dated 13 February 2009 had in clear terms stated that their refusal of the plaintiff's request for the second drawdown of the additional facilities was due to the plaintiff's failure to service the monthly interest, and secondly for failure to maintain six (6) months worth of interest in the DSRA at all times.

[215] This is indeed an arresting issue not least since this point was never pleaded in the defence. It was raised by the defendant only during PW1's cross-examination. Even after strenuous objections by the plaintiff, the defendant did not find it fit to amend its statement of defence to include this defence. Paragraphs 8(b) and 15(a) of the defence made no mention whatsoever of the dsra being the reason for the defendant and co-lenders disallowing the plaintiff further drawdowns on the additional facilities.

[216] It is of course banal to state that the omission of the DSRA in the defence would seriously prejudice the plaintiff if I were to admit this in evidence.

[217] As authorities such as *Anjali Ammal and Anor v Abdul Kareem* [1969] 1 MLJ 22 Tab 6 (plaintiff's bundle of authorities) and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 285 Tab 7 have illustrated, a disregard of the rules ought not to be condoned.

[218] In any event, as not to put too fine a point on it, it is my finding that the alleged non-compliance of the DSRA (even if such evidence was considered) could easily have been resolved by the plaintiff, had the defendant and co-lenders allowed the drawdown of the facilities. This is because the revenue generated from the project (as a result of the continuation of the construction) would have been sufficient for the requisites of the DSRA to be complied with.

[219] Lest this argument seems too simplistic, I am of the view that the DSRA requirements were already complied with by the plaintiff in view to the fixed deposit emplaced with BFB.

[220] Thus, against this background, the niggling question is: Have the defendant and co-lenders the right to withhold, refuse and reject the second drawdown of the additional facilities?

[221] This issue relates to the question of how the lenders view their obligation in the context of the condition precedent which they claimed the plaintiff had failed to fulfill.

[222] Conditions precedent are generally of two kinds. One is *a term of a contract* and the other conditions to be *satisfied before the formation* of a contract. (Emphasis added.)

[223] In the former case there is a contract. But in the latter there is no contract until the contingency has occurred. In the first case there is a valid binding conditional obligation created, but in the second there is no obligation whatsoever until the condition is fulfilled. The distinction is succinctly explained judicially by Denning LJ in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 1 All ER 970 (CA), where he said:

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject

> to the opening of credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

[224] Therefore by the same token, if a lender withdraws itself from its commitment to lend, it can only do so if the conditions precedent relate to the formation of the contract. In such a situation it can, before the fulfillment of the conditions precedent, at any time, withdraw itself. However *if it was a condition precedent to the obligation to lend*, then any withdrawal from its commitment to lend even before the borrower has begun to satisfy any condition would result in the lender breaching the contract and thus exposing itself to a suit at the instance of the borrower, as happened in the present case. (Emphasis added.)

[225] As expressed by a writer, Peter Gabriel in *Legal Aspects of Syndicated Loans*:

> ... writers on loan transactions have always emphasised that the obligation to plead does not arise until the conditions precedent are fulfilled. They have in mind that if the conditions precedent are not fulfilled then the lender is discharged of its obligation …

[226] In my view the above statement is correct. But what of the situation as above where the risk becomes bad before the conditions precedent are satisfied?

[227] Peter Gabriel (the author of *Legal Aspects of Syndicated Loans*) suggested that the lender cannot withdraw if the situation is not covered by appropriate clauses.

[228] Subject to a condition to be satisfied. This view is analogous to the reasoning in *Marten v Whale* [1917] 2 KB 480 (CA) involving the Sale of Goods Act 1893; where there was an agreement by which one party agreed to sell a vehicle to another party in consideration of the other party agreeing to buy land 'subject to purchaser's solicitors approval of title and restrictions' from first party. The Court of Appeal held that there was a contract of sale though subject to a condition to be satisfied. So, even though it may be that in future the condition may not be satisfied thus putting an end to the obligation, yet before that happens there is a valid contract.

[229] There is in such a loan provision, a unilateral obligation from which the lender cannot withdraw. As is the position in the instant case where there is a binding contract already in existence between the plaintiff and defendant and co-lenders (see also *Smith v Butler* [1900] QB 694 (CA)). A

[230] The fact that notice of borrowing is made to irrevocably bind the borrower, further indicates that the parties contemplate the unilateral obligation of the lenders. Thus the conditions precedent cannot relate to the formation of the contract. B

[231] After the notice of borrowing is given, the borrower will be obliged to satisfy the conditions precedent for otherwise, it would expose itself to a claim by the lender for breach of contract. In the instant case the plaintiff had already given the notice of borrowing and the defendant and co-lenders had allowed the first drawdown of RM7,734,420.64. C D

[232] But the defendant and co-lenders refused the next drawdown. It is my view that the only recourse open to a lender to withdraw from its unilateral obligation is to rely on the principle illustrated in *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680 (CA). E

[233] The 'Bentworth Principle' if it could be referred to as such, stands for the proposition that the court could, notwithstanding that there is a purported agreement, still look at what is the 'common understanding of people' in such a business. A Lender may then be required to show either a custom or usage showing, that any change in the risk before the borrower exercises the option will be treated as entitling the lender to withdraw from its commitments. F

[234] To show such common understanding one can depend on the fact that the market is a sensitive place. But it can be argued that lenders in such transactions entered into such contracts with their eyes open and have been or should have been properly advised. G

[235] As writers on this subject have advocated, an alternative way out for the lender is if the contract expressly provide for such a situation. H

[236] Or the lender may treat itself as discharged once there is a material change in the risk undertaken. In this situation the borrower cannot increase the risk and treat the agreement as discharged, as the right is given only to the lender. The lender then must take steps to put an end to the contract upon the happening of the event (see *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222 (PC)). I

[237] However if the lender itself is for any reason the cause of the change, then it would not be able to avail itself of this clause for a party to a contract will not be allowed to take advantage of its own wrong (see *New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France* [1919] AC 1 (HL)).

[238] In the instant case, the conditions precedent is of the first kind, ie that there is a valid binding conditional obligation created and these are the conditions that have to be satisfied prior to each subsequent disbursement.

[239] The pertinent clauses are found in cl 5 and Schedule 5 p 142 of the supplemental facilities agreement dated 7 December 1999.

[240] Such clauses are inserted for the benefit of the co-lenders. The co-lenders can refuse to lend if they are not satisfied. In that sense a breach can be waived by the lender and it can extend the loan, though the obligation to lend can only arise after the borrower satisfies the conditions precedent. In other words the obligation to lend is dependent upon the borrower performing its part of the obligations.

[241] Thus the critical or pertinent question is, did the plaintiff as borrower perform its part of the obligation?

[242] A related issue is: What did the plaintiff as borrower represent and warrant to do in the contract?

[243] In this case, the plaintiff had represented and warranted to the defendant and co-lenders in the usual way, as comprehensively set out in cl 2 of the additional facilities agreement 1999.

[244] A distinction lies in the fact that conditions are considered essential to a contract whereas warranties are of secondary importance.

[245] As such, breach of a condition entitles the innocent party to treat itself as discharged from the contract and it can sue for damages (*White and Carter (Councils) Ltd v McGreqor* [1962] AC 413 (HL)).

[246] Whereas a breach of warranty entitles the innocent party to sue for damages and not to terminate the contract. To quote the author Peter Gabriel:

> ... As a corollary to this, the innocent party, on a breach of condition has the option the treat the breach as a breach of warranty and thus not terminate the contract but merely sue for damages (see *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 House of Lords, per Lord Reid at pp 250–251, Lord Morris at p 256). (Emphasis added.)

[247] The case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 47A(CA) was unclear on the position of conditions and warranties. But the law on this issue was put in perspective in *Bunge Corp v Tradax SA* [1981] 2 All ER 513 (HL), where the House of Lords concurred with Lord Roskill. The *Bunge Corp* case laid down that the basic approach in analysing a contract is to see whether a term is a condition or warranty. However Lord Roskill took the view that the dichotomy between conditions and warranties is not complete, for there is a third category of 'innominate' terms, the consequence of which will depend on the seriousness of the breach.

[248] Therefore Lord Roskill took the view that what needs to be done as a matter of construction, is to see whether a particular term is a condition, warranty or an innominate term. If it is an innominate term, then the test propounded by Diplock LJ in *Hong Kong Fir* is to be applied ie whether it goes 'to the root of the contract'.

[249] In other words, parties to a contract may stipulate that even minor terms are to be treated as 'conditions' a breach of which would entitle the innocent party to treat itself as discharged from further performance (see *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235). However this would be a matter of construction and so the contract must be looked at in its entirety.

[250] One of the issues in the instant case is whether the non-payment and therefore arrears of interest and non-fulfillment of the DSRA which I had found to be baseless, amounts to whether these go to the root of the contract.

[251] It is my view that taking into account the fulfillment of the conditions precedent for the reinstated Tranche C of the bridging loan and the approval of the drawdown of RM7,734,420.64 cents for purposes of constructing Phase I of the revised project and the enabling provision of the agreement which the defendant chose not to execute (ie to uplift the fixed deposit), the defendant and co-lenders had breached their implied and express obligations to make available the funds to the plaintiff under the reinstated Tranche C of the bridging loan. This had directly caused the construction and development of the revised project to cease, for which the plaintiff contend that it suffered irreparable loss and damage.

[252] Importantly at all material times, the plaintiff had represented to the defendant and co-lenders that the plaintiff was able to complete the construction of Phase I of the revised project within ten months subject always that the defendant and co-lenders continue to provide financing to the plaintiff for the purpose of completing construction of the revised project.

[253] Thus in view of the defendant's unwarranted and unreasonable failure and/or refusal to allow the plaintiff to drawdown the loan facility, the plaintiff had to seek alternative methods of financing to complete the construction of the said project.

[254] As had been alluded to earlier, this is a situation of a condition precedent to the obligation to continue to lend. Thus any withdrawal from its commitment to lend even before the plaintiff had begun to satisfy the condition would result in the Lender breaching the contract. The event was not caught by the default clause and thus in my view, the defendant and co-lenders cannot withdraw from the agreement and by doing so they had breached the contract.

[255] Then there is the issue of time. In the instance case, as in most contracts, time in carrying out one's obligation is critical, even if not in essence. It is trite that the law requires that an agent carry out its duty with due diligence, coupled with care and skill, within a *reasonable time*. (Emphasis added.)

[256] As is evident in the preceding paragraphs, delay by the defendant and co-lenders in response to their obligations, appear to be the leitmotif in their approach to this contract.

[257] It is not without significance that there was inordinate delay in the defendant's and co-lenders response with regards the redemption statement and in the disbursement of the advance payment for issuance of a bank guarantee to secure the CFO.

[258] In fact, the defendant's and co-lenders uncompromising stance was apparent long before the plaintiff's request for the redemption statement.

[259] I find that in view of the facts and legal position of parties as alluded to in the preceding paragraphs, the plaintiff had complied with the conditions precedent to facilitate the drawdown of the reinstated Tranche C of the bridging loan. The defendant had in fact approved the drawdown of RM7 odd million for the purpose of restructuring Phase I of the revised project.

[260] Yet when it rejected the plaintiff's request for further drawdown in July 2000 (despite fulfillment of conditions precedent of supplementary agreement), the defendant demanded the plaintiff appoint a consultant to re-evaluate the feasibility of the revised project.

[261] So for the next six months, the project was put on hold. Time was spent in getting the report done. Even as the consultant gave sufficiently positive reports that the market value and force-sale value (of the revised project) was sufficient to repay the loan facility the defendant failed, refused and/or neglected to allow the plaintiff to continue to drawdown the loan facility for the purpose of completing the revised project.

[262] This impasse could only be broken by the plaintiff in trying to find a solution to it, whilst all the time being acutely aware that time was running out on them.

[263] Nevertheless the plaintiff obtained a white knight willing to provide and take over financing of the revised project. The plaintiff then asked the defendant for 30% waiver of the outstanding sum due and owing under the loan facility as there was a high exposure of the plaintiff, arising from liquidated and ascertained damages (LAD) to be paid to the plaintiff's purchasers for late completion and delivery of respective individual properties therein. As had been referred to earlier, the plaintiff had procured letters of waiver from over 70% by purchasing of Phase I to limit their claims form LAD for late delivery by individual properties to a fixed total sum of RM10m, *subject* to the property by delivered on or before 31 December 2002. (Emphasis added.)

[264] Notwithstanding the above, the defendant and co-lenders took an inordinate amount of time in issuing the redemption statement. And even after it was given, they imposed onerous conditions on it.

[265] What then could be the reason for the defendant's and co-lenders' attitude, inertia and motive (if any)?

[266] Considering that financial institutions such as the defendant and co-lenders are peopled by professionals and are properly regulated, where time is always a crucial element, a departure from the norm as seen in this transaction seems disingenuous.

[267] However, critical events shed light on the defendant's and co-lenders' lack of vigor in executing their part of the bargain.

[268] The first relates to the defendant's and co-lender's over exposure in the broad property sector, which explains their reluctance in carrying on with the terms of the contract with the plaintiff. The defendants' and co-lenders' lack of capacity to advance further lending to the plaintiff bore itself out in their reluctance to comply with the same.

[269] In fact on 7 November 2000, the defendant had proposed to the plaintiff, to allow it and the co-lenders to participate in the development of the revised project on a *profit-sharing* basis, rather than considering the drawing down of the loan facility to the plaintiff (which is to be utilised for the completion of Phase I of the revised project).

[270] What is of importance is the existence of critical documentary evidence manifesting the above fact.

[271] This is seen with startling clarity in the copy of an internal memorandum (during the course of negotiations between the plaintiff and defendant) which was prepared by defendant's officers. This document (P28) which later become the subject matter of a contempt application by the plaintiff against the defendant, clearly stated that the defendant and co-lenders were unwilling to provide any further financing to the plaintiff for the construction and completion of Phase I of the revised project, as the defendant and co-lenders were over-exposed in their overall lending to the property sector (see P28 — attached).

[272] Firstly, it was not without significance that the proposal by the defendant to profit sharing, is contrary to the provisions of the Banking and Financial Institution Act 1988.

[273] The defendant as a fiduciary is under a duty not to make a profit or to take a benefit by virtue of its position as a fiduciary without the consent of the plaintiff and the relevant authorities (BNM, for instance). It should not place itself in a position of there being a 'possibility of conflict' in the sense made by Lord Upjohn in *Phipps v Boardman.*

[274] Although the defendant did not carry out their profit sharing proposal, to suggest this course of action at the critical time of drawdown of the facility do not speak well of the defendant's conduct.

[275] Secondly, in the course of the trial, the defendant was at pains to downplay the significance of this internal memorandum. It was more infernal given the implication.

[276] One of the signatories of the said internal memorandum one En Ahmad Saifuddin Morat was subpoenaed but evaded service several times and came to court only after he was on the brink of being held for contempt of court.

[277] His testimony concerning the said internal memorandum was evasive

at best, and downright unreliable at worst. In any case, the internal memorandum prepared by the officers of the defendant clearly stated that the defendant and co-lenders were unwilling to provide any further financing to the plaintiff for the construction and completion of Phase I of the revised project, as the defendant and co-lenders were over-exposed in their overall lending to the property sector.

[278] Nothing could be more stark than this, in the revelation of the defendant's and co-lender's position vis-a-vis the plaintiff and the loan facility. The cross-examination of the relevant witnesses bear this out. Clearly, the extent of the defendant's and co-lender's malice went past any fear of being held in contempt.

[279] In view of the above, I find that the defendant had ulterior motives in not providing financing to the plaintiff, which now puts the jigsaw of missing parts of the defendant's incomprehensible conduct, into place. The defendant had unreasonably refused to allow the plaintiff to draw down the loan facility. The defendant and co-lender's acted maliciously in depriving the plaintiff of the said facility and this put paid to the plaintiff's construction and completion of the revised project, escalating the plaintiff's loss and damages suffered, for the non-completion of the same.

[280] As can now be seen, the defendant and co-lenders had no intention of providing any financing to the revised project since clearly their rationale for refusing to provide financing was predicated on the non-payment of interest and principal which was untrue.

[281] Clearly, the extent of the defendant's and co-lender's malice went past any fear of being held in contempt. As could be seen in the course of trial, the internal co-lenders' own witnesses as to the existence of the documents bear this out.

LOSS AND DAMAGES SUFFERED BY THE PLAINTIFF

[282] At the outset of the trial of both suits, it was common knowledge that the plaintiff was facing numerous claims from the end purchasers of the project for late delivery of the individual units purchased by them.

[283] It is also a fact that the defendant and co-lenders were also fully aware of the loan granted by Malaysian Assurance Alliance Bhd ('MAA') to the plaintiff for the sum of RM35m to complete the remaining construction works of the shopping podium. In fact, during the course of the trial, the defendant's witnesses testified that MAA was commencing an action against the plaintiff for the recovery of the loan amount.

[284] How did this come about? Or putting it in another way, how did the plaintiff find itself in this unhappy position? As events had unfolded, it is crystal clear that the problems faced by the plaintiff were a direct consequence of the defendant's and co-lenders' unreasonable and unlawful act of refusing the drawdown of the facilities for the plaintiff's benefit.

[285] Had the defendant and co-lenders fulfilled their part of the contract and acted within the terms of their agreement with the plaintiff and within the bounds of reasonableness and good faith, the plaintiff would, after settlement of payments to various third parties, be a debt-free company and owner of a developed property valued at approximately RM38.740m.

[286] This is borne out by the valuation made for the shopping podium (see p 813 and bundle D) which the plaintiff procured from the feasibility report prepared by Horwarth, Mok and Poon. In fact this feasibility report was demanded by the defendant and co-lenders, whereby the unsold area of the shopping podium was valued at RM150,525,00.

[287] However, adversities notwithstanding, the plaintiff did complete the shopping podium once the funds were made available through the MAA loan.

[288] Given the above and the completely irrational delays caused by the defendant and co-lenders, it is obvious that:

(a) the plaintiff was deprived of the opportunity to limit its exposure for LAD for late delivery of the individual properties to RM10m;

(b) the plaintiff was caught out at the 11 hour, when a unilateral imposition was handed down by the defendant that part of the MAA's contribution was to be utilised for a partial redemption of loan facility to the defendant and co-lenders. The plaintiff thus suffered a shortfall of funds to complete the construction of Phase I;

(c) The plaintiff did manage however to complete the construction of Phase I on 21 March 2003 as represented to the defendant, co-lenders and MAA in accordance with the terms and conditions and covenants of second supplementary agreement. The plaintiff delivered vacant possession on or about January 2004;

(d) However the shortfall of funds as alluded to earlier, meant that the plaintiff had to seek an advance payment of RM5m to procure the requisite Certificate of Fitness for Occupation for the revised project.

[289] I find that it is evident from a careful reading of the cause papers and testimony of witnesses that the defendant was fully aware that if the revised project (Phase I) is not immediately operational, the plaintiff was not in a

position to repay the agreed repayments and/or servicing of interest of the loan facility to the defendant and co-lenders and MAA.

[290] However, in keeping with its general attitude of impassivity, the defendant and co-lenders, true to form, dragged their feet in granting the advance payment.

[291] It was of course critical that the plaintiff sort out these requisites as it had been made clear by the plaintiff to the defendant and co-lenders that without the advance payment the plaintiff would be unable to procure the CFO from the revised project to commence its operations. Furthermore, the defendant and co-lenders were fully aware that this had the consequential effect of placing the plaintiff in the precarious position of not knowing whether it is able or otherwise to repay the agreed repayments and/or servicing the interest of the loan facility to the defendant, co-lenders and MAA.

[292] In addition, the defendant and co-lenders had also agreed to grant the plaintiff a moratorium on the repayment and/or servicing of interest of the loan facility to 30 January 2005 wherein the first agreed installment and/or servicing of interest to be effected by the plaintiff to the defendant was to commence on or before 30 April 2005 (the 'moratorium period').

[293] It must be explained here that the rationale of the moratorium period was to negate the necessity of the plaintiff having to service the agreed installments and/or interest until the revised project (Phase I) was operational and generates income for the plaintiff, for it to commence its agreed installments and/or interest upon the expiration of the moratorium period.

[294] It must also be pointed to that even though the advance payments were approved four months later ie on 8 April 2004, the defendant failed to disburse the advance payments promptly to the relevant authorities. The final statutory compliance was only disbursed by the defendant on 10 November 2004. Yet the defendant and co-lenders had the temerity to threaten the plaintiff with legal action if the plaintiff is unable to commence the repayment and/or servicing of the interest on or before 19 May 2005.

[295] In my view, the defendant is fully aware that the plaintiff's predicament is caused directly by the defendant's breach of duties in granting and administering the drawdown of the loan facility.

[296] The plaintiff had contended that the defendant was under a duty to act in good faith and honesty in granting and administering the drawdown of the loan facility to the plaintiff. It is my view that the defendant had breached its duty and legal obligations to the plaintiff.

DUTY TO ACT IN GOOD FAITH AND HONESTY

[297] The defendant contend that a breach (if at all) of the duty to act in good faith and honesty is not a proper or even a cause of action. This contention of the defendant's was put in not without some derision on its part.

[298] The defendant contended that no such cause of action even exist, to begin with.

[299] The question now is: Is this true?

THE CONTRACTUAL DUTY OF GOOD FAITH AND FAIR DEALING

[300] What is 'good faith'? In effect it refers to two fundamentally different senses: (a) 'good faith purchase' and (b) 'good faith performance'. In the former, a person is a purchaser in good faith only if the person acted with innocent ignorance or a lack of suspicion. The latter meaning of 'good faith' refers to an inquiry as to decency, fairness or reasonableness in performance or enforcement.

[301] This concept is especially found in the American common law, codified in its Uniform Commercial Code (UCC).

[302] Both common sense and tradition dictate that good faith performance, such are those found in loan agreements as in the instant case, would be measured by an objective standard, 'based on the decency, fairness or reasonableness of the community' (see Farnsworth *Good Faith Performance and Commercial Reasonableness* [1962] 30 University of Chicago LR 666).

[303] In fact, I find the New York Court of appeals case of *Kirke La Shelle Company v Paul Armstrong Company* 263 NY 79 (1933) at p 87, to be persuasive. It states that:

> ... In every contract there is an implied covenant that neither party shall do anything which will have to effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

[304] In fact in the United States, the contractor's duty of good faith and fair dealing has proved to be a source for invoking lender liability litigation. Although I am aware that the said contracts in the United States are governed by the UCC, a proper construction of our contract laws would also imply the imposition of the common law duty of good faith and fair dealing. The case of

KMC Company v Irving Trust Company 757 F 2d 752 (6th Cir 1985) in the United States was ruled in the borrower's favour, against a lender who precipitately refused to advance further funds within the limits of a loan facility.

[305] Although a fusillade of criticisms has been launched against the obligations of good faith and fair dealing even in the United States, courts have stood steadfast in granting the borrower this cause of action.

[306] In fact it even went a step further in allowing claims for tortious liability for breach of the contractual obligations of good faith and fair dealing, though some of the decisions have been criticised.

[307] However there is general agreement that traditional tort remedies can be invoked in lender liability suits. Actions founded upon fraud, duress, tortious inference with contracts and negligence have been successful against lenders (see *Granoff 'Emerging Theories of Lender Liability: Flawed Application of Old Concepts'* (1987) 104 BLJ 492 at pp 501—505 and 512. Anon, '*Lender Liability: Breach of Good Faith Lending and Related Theories* (1988) 64 North Dakota LR 273 at pp 303–314).

[308] A case in point is *State National Bank of El Paso v Farah Manufacturing Co* 678 SW 2d 661 Tex Ct App 1984, which provides an illustration of duress in the form of economic coercion. The borrower was not in default on its loans, nor was its ability to service the loans in the future questioned. Yet the bank compelled the borrower to comply with its demands through the 'threat of default and imminent bankruptcy and padlocking'. The court held that it was a clear abuse of power by the lenders over a financially dependent borrower and it amounted to actionable duress.

[309] Thus tortious liability for breach of a duty of good faith and fair dealing has been utilised in the field of lender liability. It follows therefore that parties to a contract are subject to an implied duty to do all that is reasonably necessary to secure performance of the contract. 'Neither party may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit' (per Dixon J, in *Sheppard v Fett and Textiles of Australia Ltd* (1931) 45 CLR 359). Even if it is argued that it is not necessary to imply a term relating to good faith performance into a loan contract in order to give it business efficacy, our case laws indicate that courts are prepared to imply a term relating to good faith performance if the lender assumes special or fiduciary responsibilities, as in the instant case.

[310] The plaintiff had placed trust and confidence in the defendant and co-lenders. They had assumed responsibility for providing the borrower with investment and financial advice. For reasons best known to themselves and for

apparent ulterior motives the defendant and co-lenders did not hold up their end of the bargain. They had breached their duties owed to the plaintiff in contract, and tort and as a banker.

[311] It is my finding therefore that the defendant's and co-lenders had deliberately and maliciously engineered a default of the facilities by the plaintiff, by creating a purported a default on the interest payments due under the facilities and they had created the purported default on the interest payments and had deliberately withheld critical funds which were to be utilised by the plaintiff to complete the construction of the project together with a Certificate of Fitness for Occupation.

[312] It was solely due to the defendant's and co-lenders' deliberate and malicious mismanagement of the facilities that had caused the plaintiff's dire financial position.

[313] Furthermore the unlawful acts by the defendant and co-lenders is a breach of the plaintiff's legitimate contractual expectation that the facilities would be administered and managed by the defendant and co-lenders in a proper and bone fide manner and that the facilities would be promptly drawndown to be used to complete Phase I and the revised Phase II of the project.

[314] (See *Bench Win Sdn Bhd v Eon Bank Bhd* [2003] MLJU 472and *Hongkong Bank Malaysia v Wexcel Holdings Sdn Bhd* [2005] 2 MLJ 616).

[315] From the evidence adduced, it is therefore my finding that the defendant and co-lenders had breached their obligations. To reiterate the particulars of breach are as follows:

(a) Failure to allow drawdown and make available the loan facility even though the plaintiff had complied with conditions precedent of the supplemental facility agreement;

(b) failure to allow drawdown the facility even though the plaintiff had complied with the defendant's request to appoint a consultant to prepare a feasibility report on the viability of the revised project, wherein the consultant had recommended in the best interest of the parties the revised project ought to be completed;

(c) Failure to promptly issue a redemption statement at RM38,500,000 even though the defendant was fully aware of the following:

(i) that the plaintiff had secured fresh financing for the revised project from a white knight; and

(ii) the plaintiff had secured a letter of waiver from majority of its purchasers for the revised project to limit the total liquidated damages for late delivery of the individual properties in the revised project to RM10,000,000.

(d) Failure to approve and disburse the advance payments for statutory compliance to the plaintiff, including but not limited to the bank guarantee to JPP, even though the defendant was fully aware that the statutory payments were required to obtain the requisite Certificate for Fitness for the Phase I;

(e) Failure to assist the plaintiff to commence the operations of the Phase I even though the defendant was fully aware that the proceeds of rental of the Phase I was required by the plaintiff to repay the loan facility granted b the defendant, co-lenders and MAA; and

(f) Failure to grant the plaintiff an extension of the moratorium period to the 30 January 2006, when the defendant was fully aware that the delay of the commencement of the operations of Phase I was directly caused by the defendant's own failure to disburse the advance payments promptly to the relevant authorities.

[316] It is also reiterated that during the course of this trial, the defendant & co-lenders on numerous occasions attempted to suppress the admission of the internal memorandum. The inference which I drew from this is that the defendant and co-lenders were desperate to conceal critical evidence which proves their financial inability to grant of further lending to the plaintiff.

[317] Thus, it is now clear that critical information clearly draws an irresistible inference on the fact that the defendant's and co-lenders' deliberate and malicious act of withholding the drawdown of the facilities in July 2000 was predicated on their own financial inabilities rather than the purported default by the plaintiff and that the defendant and co-lenders were motivated by mala fides in wanting to force the plaintiff into an unethical profit-sharing arrangement.

[318] Based on the unchallenged oral testimonies adduced from both PW1 and PW3, at all material times, it was the plaintiff's objective in wanting to complete the shopping podium for the benefit of all the stakeholders (especially the end purchasers) of the project including the defendant and co-lenders themselves.

[319] The fact that the plaintiff is a bona fide developer was confirmed by the defendant's own witness Encik Rozidin bin Masari (DW1). DW1 in clear terms, said that the lenders had faith in the plaintiff as a borrower and trusted that it could complete the project and that the said project was viable and profitable.

[320] Given the above testimonial, the defendant and co-lenders unlawfully denied the plaintiff the funds which are so critical in completing the project on schedule. It was incredulous. This unlawful denial had a domino effect of causing an inevitable chain reaction which affected the viability of the project drastically, including the plaintiff's ability to repay the facilities.

[321] In view of its breach in contractual, tortious and fiduciary obligations under a financial arrangement, the defendant and co-lenders are therefore obliged to pay damages to the plaintiff.

[322] A slew of authorities support this position see:

(a) *Abdul Rahim Abdul Hamid v Perdana Merchant Bankers Bhd* [2006] 5 MLJ 1 Tab II

(b) *Kluang Wood Products Sdn Bhd v Hong Leong Bank Bhd* [1999] 1 MLJ 193

(c) *Perwira Habib Bank Malaysia Berhad v Hong Huat Holdings Sdn Bhd & Ors* [1991] 2 MLJ 29; [1991] 2 CLJ 906.

[323] I also find that in the event a bank breaches its obligation (as did the defendant and co-lenders in the instant case) under a facilities agreement, the bank is not entitled to profit from its wrongdoing. In fact in this case, my view is that due to this, the security which was placed by the plaintiff should be released forthwith and discharged (see *Abdul Rahim Abdul Hamid v Perdana Merchant Bankers Bhd* [2006] 5 MLJ 1 Tab II).

[324] I agree with the submission of counsel for the plaintiff that as a result of the defendant's and co-lenders' breaches in contract, tort and as a banker to the plaintiff, they are disentitled to recover any part of the loans which were granted by them to the plaintiff (and that all securities placed by the plaintiff to them shall be forthwith released and discharged).

[325] It is noted that during the course of the trial, the defendant's and co-lenders' witnesses had confirmed and admitted that the present syndication consists of the following lenders:

(a) Malayan Banking Bhd;

(b) Alliance Bank Malaysia Bhd; and

(c) Affin Bank Bhd.

[326] It was confirmed by DW3 that the co-lenders shall be jointly and severally liable for any judgment this court pronounces against them.

[327] It is noted that in respect of Suit No D2–22–665 of 2005, the plaintiff's claim for general damages to be assessed by this court had been successfully done during the course of this trial. The plaintiff had proven part of its losses suffered by the breaches by the defendant and co-lenders, in particular:

(a) the end purchasers' liquidated and ascertained damages claims suffered by the plaintiff amounting to approximately RM80.5m, which was proven through the testimony of DW1 who agreed during cross-examination, that the aforesaid LAD exposure was suffered by the plaintiff; and

(b) the repayment of the MAA loan of RM35m (excluding the capitalised interest and default interest) which DW3 had admitted that MAA is now intending to initiate an action against the plaintiff.

[328] In that connection, this court grants the plaintiff a specific monetary compensation of RM115.5m.

[329] With regard to the balance of the plaintiff's claims, these are to be assessed by the senior assistant registrar.

Plaintiff's claim allowed.

Reported by Kohila Nesan